Supreme Court, U.S.
FILED

952013 JUN 14 1996

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**JIM GUY TUCKER,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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124 pp

## QUESTIONS PRESENTED

1. Does an independent counsel, appointed under 28 U.S.C. § 591 *et seq.* (the Independent Counsel Act) have the authority to indict and prosecute persons who are not high officials of the Executive Department of the Federal Government for crimes which are not factually linked to any charge against any such high official?

2. Does a Court of Appeals have the authority, in responding to a motion of counsel for the recusal of a trial judge, to order removal upon reversal and remandment on grounds known to the moving party prior to the moving party receiving an unfavorable ruling from the Court below?

3. Does 28 U.S.C. § 2106, allowing remandment on just terms, supplant all requirements of Sections 144 and 455 of that title requiring notice to the Court and a ruling by the Judge affected by the motion before a compulsory recusal is granted?

## LIST OF PARTIES

The petitioner is Jim Guy Tucker. The Respondent is the United States, represented by Hon. Kenneth Starr, Independent Counsel. Co-defendants in the case are William Marks and John Haley.

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**JIM GUY TUCKER,**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

The Petitioner prays that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Eighth Circuit entered in this case on May 6, 1996, which judgment denied rehearing, with suggestions for rehearing in banc, with dissenting opinion, as to an opinion filed March 15, 1996.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas is attached at App. 47, and is reported at 898 F. Supp. 654 (E.D. Ark. 1995). The opinion of the United States Court of Appeals for the Eighth Circuit is attached at App. 1, and is reported at 78 F.3d 1313 (8th Cir. 1996). The dissenting opinion filed on the denial of petition for rehearing and suggestions for rehearing en banc is attached at App. 29, and is not yet reported.

## JURISDICTION

The judgment of the United States District Court for the Eastern District of Arkansas was entered on September 5, 1995. The judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 15, 1996, and became a final judgment with the denial of the petition for rehearing and suggestions for rehearing en banc on May 6, 1996.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Independent Counsel Act ("Act"), 28 U.S.C. § 591 *et seq.* are reproduced at App. 83. Pertinent portions of the United States Constitution are reproduced at App. 80, and 28 U.S.C. § 2601 is at App. 101.

## STATEMENT OF THE CASE

*(As to Question One: Independent Counsel)*

Independent Counsel Kenneth Starr was appointed on August 5, 1994 by the Special Division of the Court of Appeals for the District of Columbia to

> "investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Act (28 U.S.C. § 591 *et seq.*, App. 87) under which Mr. Starr was appointed was subjected to constitutional challenge in *Morrison v. Olson*, 487 U.S. 654 (1988). This Court described the Act as being

> ". . . for the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high ranking Government officials for violations of federal criminal laws."

*Id.*, 487 U.S. at 660.

Independent Counsel brought an indictment against Petitioner and two other people, none of whom are high ranking government officials or "persons" as described in the Act. 28 U.S.C. § 591. Mr. Tucker, although currently the Governor of Arkansas, was not a public official in 1987 and 1988, when the matters in the indictment are said to have occurred, and neither Marks nor Haley have ever been Governmental officials.

The indictment charged Petitioner and defendant Marks with making a false statement to a Small Business Investment Company and conspiring to do so. (Indictment, Counts I and II). It charged all three defendants with a conspiracy to defraud the United States, 18 U.S.C. § 371, in a tax matter, in Count III. The indictment does not mention any Government official or any "person" as the term is defined in 28 U.S.C. § 591.

The defendants moved to dismiss the indictment on the ground that the independent counsel was beyond his powers in bringing an indictment that did not relate, in any way, to the Executive Department of the United States. The District Court granted the motion. App. 47, *United States v. Tucker*, 898 F. Supp. at 663 (E.D. Ark. 1995).

The decision of the District Court was based, in part, on a statement in independent counsel's brief to the District Court, which said "(A)lthough the facts do not link Defendants to a specific relationship among CMS, the Clintons or James B. McDougal . . .", *Id.*, 898 F. Supp. at 657, and on an unanswered affidavit from Petitioner stating that the President and his First Lady had nothing to do with the transactions in the indictment. *Id.*, 898 F. Supp. at 656. App. 51 and 52.

The District Court found the record "devoid of evidence of *any* relationship or connection between the Clintons and McDougal and any of the matters alleged in the indictment." App. 59, *Id.*, 898 F. Supp. at 660.

On appeal independent counsel supplemented the record with an indictment from another case against Tucker, which also did not mention the President but did have McDougal as a co-defendant, and also supplied the

Court of Appeals with a pleading in which the Attorney General stated that she had a political conflict of interest as to the McDougal matter. *United States v. Tucker*, 78 F.3d at 1321. Nothing in the record indicates any political conflict of interest between the Attorney General and Petitioner or either of the co-defendants.

James McDougal was not a party to this case, and is not mentioned in the indictment; his company, Madison Guaranty Savings & Loan, is not mentioned.

The Court of Appeals panel held that the decision of the Attorney General to refer this investigation to independent counsel as a related matter was unreviewable and that, if it were reviewed, it would be within her entire discretion to refer this case to Independent Counsel. *United States v. Tucker*, 78 F.3d at 1316, 1319 and 1322. The panel also noted that Independent Counsel had, in an abundance of caution, received a referral order from the Special Division of the Court of Appeals. The Opinion says *Id.*, 78 F.3d at 1316; but see fn 6, 1318.

> "We thus reject the appellees' contention that the subject matter of the referral jurisdiction is required to relate to James McDougal's or President Clinton's or Mrs. Clinton's relationship to CMS or Madison Guaranty or the Whitewater Development, which is the subject matter of the Independent Counsel's original investigatory jurisdiction."

*Id.*, 78 F.3d at 1321.

The Court of Appeals then reversed the District Court's decision, and remanded the case for trial. The remand also removed the District Judge from the case.

On petition for rehearing and suggestions in support of rehearing in banc two judges of the Court of Appeals stated that

". . . the panel opinion, in holding that the judiciary lacks jurisdiction to review the scope of the authority of the special prosecutor, commits fundamental error. It fails to separate the unauthorized review of the special prosecutor's exercise of discretion from the scope of the special prosecutor's statutory authority." (App. 30)

With dissent, the petition for rehearing was denied.

*(As to Questions Two and Three; Removal of District Judge)*

Independent Counsel, in his appellate brief, asked that the case be remanded to some judge other than Judge Woods upon remand. The Opinion granted that motion "to preserve the appearance of impartiality". *United States v. Tucker*, 78 F.3d at 1322. The Opinion notes that Independent Counsel "relies primarily on newspaper articles" in making his attack on Judge Woods. *Id.*, 78 F.3d at 1323.

The Opinion notes that Tucker received a standing ovation at a political fund raiser shortly after this indictment, and that the President said, openly, that he was glad to see Tucker and glad that he received a good reception. Tucker was quoted (at a different time) as saying that the President was a target of independent Counsel. *Id.*, 78 F.3d at 1323.

The Opinion also notes that the District Judge appointed Mrs. Clinton as counsel in a school desegregation case, and that he admitted that he "came to admire her" during that period. and that His Honor spent the night at the White House. *Id.*, 78 F.3d at 1323.

The Opinion then held that, under 28 U.S.C. § 2106, there was no requirement of an initial ruling on a petition by Judge Woods, as would be required under 28 U.S.C. § 144 or 455, and that the Judge could be removed from the case to ensure "the *appearance* of impartiality". The Court then applied the "reasonable person" test for recusal applicable to Section 455. *Id.*, 78 F.3d at 1324.

The Opinion says that this is "not a case . . . where actual bias under Sec. 455(b) is alleged", and that a raising of the alleged prejudice as part of its appellate brief was timely . . . that Judge Woods need be given no opportunity to consider or rule upon the motion. *Id.*, 78 F.3d at 1324.

The remand requires that the case be re-assigned.

## REASONS FOR GRANTING THE WRIT

(A) *As to Independent Counsel:*

This is a case of significant and current public importance. An independent counsel asserts, for the first time, the right to prosecute persons who are not part of the Executive on facts which involve no allegations against the Executive. This is the kind of expansion of authority against which this Court warned in *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison* limits the "Ethics in Government Act (28 U.S.C. § 591 *et seq.*) so that it does not violate the doctrine of Separation of Powers, and does not give away great portions of the Executive authority of the United States to an officer appointed by a judicial body. *Morrison* limits the authority, by way of construction of the Act (28 U.S.C. § 591, *et seq.*). But now, as

was predicted in the dissent in *Morrison*, an independent counsel goes beyond the "narrow construction" imposed on the Act by this Court, and seeks to become a general prosecutor. See *Id.*, 487 U.S. at 682, and dissent, at 487 U.S. 730-734.

The Act, as narrowly construed in *Morrison*, 487 U.S. at 682, should be read as construed by this Court so as to avoid unconstitutionality. To read it to allow independent counsel to become a general prosecutor would again implicate Separation of Powers and the Appointment Clause, and require a re-examination of all that was done in *Morrison*. *Id.*, 487 U.S. at 693. The independent counsel in *Morrison* was investigating Theodore Olson, a member of the Executive. We submit that the answer, then, would have been different had Ms. Morrison been investigating persons having no connection with the Executive.

The Act provides for the appointment of an "independent counsel" who is to "investigate and, if appropriate, prosecute certain high ranking Government officials for violations of federal criminal laws." *Morrison*, supra, at 659.

The theory of the statute, better explained by a reading of *Morrison* than by the recapitulation of counsel, is that Congress may, consistently with the doctrine of Separation of Powers and the Appointments Clause of the United States Constitution, U.S. Const, Art. II, Sec. 2, cl. 2, *Morrison*, supra, at 670, take away a portion of the Executive power of the President of the United States and confer that power on an independent counsel when the object of a prosecution is the Executive himself or someone so close to the Executive as to make prosecution

by the Attorney General not disinterested.[1]

For this reason, and against the challenge that a portion of the Executive power, allowing the Executive full discretion as to criminal prosecutions and the power of unfettered removal, could never be taken from the Executive, this Court upheld the Act in *Morrison*. The doctrine of Separation of Powers was respected and reaffirmed in *Morrison*. See 487 U.S. at 693. Cf. *Myers v. United States*, 272 U.S. 52 (1926) (Legislative power restricted to "advise and consent", not to removal).

But, this Court did *not* countenance an "independent counsel" who could, under the statute, prosecute any case involving any individual, without any consideration of the scope and boundaries of the powers conferred upon his office. It is a challenge to the scope of those powers that was made and upheld in the District Court and by two dissenting judges in the Court of Appeals. The majority of the Court of Appeals did not agree, and held, in substance, that the decision of the Attorney General to give up part of the powers of the Executive could not be reviewed. *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1986).

This is *not* a case in which the Attorney General appoints some special attorney, who remains subject to her direction, to handle a local case, in which case her authority cannot be reviewed. See, e.g., *In re Persico*, 528 F. 2d 41 (5th Cir. 1975). This is a case in which a slice of the Executive authority of the United States is given over to a person who is not appointed by the President

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[1] A history of Executive Department difficulties that led to the passage of the Act may be found in *In re Olson*, 818 F.2d 34 (D.C. Cir. 1987).

and who is not subject to supervision by the Executive. The question is whether or not that appointee can extend his own authority to any criminal case that comes to his attention and still remain within his statutory authority, as that authority is limited in *Morrison*. It should not make any difference that the Executive willingly gave away the power. Power given to the Executive by the Constitution is not his to give away, but only to execute. U.S. Const. Art. II, Sec. 1.

This Court did not, in *Morrison*, countenance the creation of a prosecutor with an unlimited scope to his powers who could prosecute any case anywhere that might come into his office while acting as Independent Counsel. Just exactly that has occurred here.

This is important because an independent counsel, once appointed, cannot, effectively, be supervised or recalled. (28 U.S.C. § 596(a)(1)) Independent Counsel receives an indefinite appointment which may last a very long time. An independent counsel is appointed to investigate a particular individual in the executive department, and an extension of his authority . . . by any means . . . beyond the scope of his statutory authority, is clearly *not* approved by *Morrison*. An officer who cannot be recalled except for judicially reviewable cause cannot receive part of the Executive power of the United States except within the narrow confines of the power to investigate and prosecute "persons" in the Executive branch as the Act defines the term. 28 U.S.C. § 591(a).

The District Judge found that he had the power to decide that the case at hand was not related to the investigation of the President. Independent Counsel conceded that there was no factual relationship in a brief in that Court. *Morrison* requires a "demonstrable relationship".

*Morrison*, 487 U.S. at 679; *United States v. Secord*, 725 F. Supp. 563, 567 (DDC 1989). The authority of the officer was thus measured and limited by the District Court, just as *Morrison* required.

For the institution of independent counsel to work, and to remain constitutional, it must be limited to its original purpose and scope, which is to investigate and prosecute the Executive. This is the *first* independent counsel case that has gone beyond the Executive department,[2] and it is of the greatest public importance to determine whether or not there are boundaries to the scope of the powers of independent counsel.

Independent counsel should not be allowed to take over the prosecutorial powers of the Attorney General . . . with or without her consent . . . in general criminal cases factually unrelated to the member of the Executive who is under investigation. To allow this is to ignore the words of this Court in *Morrison*, supra, at 672:

> ". . . appellant's (independent counsel's) office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an

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[2] Independent counsel prosecutions, as reported, have been of Executive department "persons". Among the cases are: *In re Jordan*, 745 F.2d 1574 (D.C. Cir. 1984) (Presidential White House assistant Hamilton Jordan); *In re Donovan*, 877 F.2d 982 (D.C. Cir. 1989) (Secretary of Labor) *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir. 1989) (Assistant to the President); *In re Sealed Case*, 880 F.2d 1367 (Spec. Div. 1989) (unknown, identified as "high government official"); *In re Meese*, 907 F.2d 1192 (D.C. Cir. 1990) (Attorney General). In *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991) an individual known to Attorney General Meese was held to be outside the jurisdiction of independent counsel.

> independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General." (supplied)

In this case it cannot be disputed that the defendants are all non-members of the Executive department. None are "certain federal officials". It cannot be disputed that this case . . . a claim of a false loan application on a repaid loan and a tax avoidance conspiracy involving a Texas bankruptcy . . . had nothing to do with the President. The universal interpretation of the Act, even by those critical of its constitutionality, is that it applies to the prosecution of "persons", as defined in the Act, in the Executive Department. See 28 U.S.C. § 592, and "*The Independent Counsel Mess*', 102 Harvard L. Rev. 105, 108 (1988).

It should make no difference that the Attorney General consented, because her authority belongs to the Executive and to the People, and is not hers to give away. The Comptroller General was not permitted to give away his independence of the Executive branch of the Government in order to save the constitutionality of the Balanced Budget Act, although his counsel sought to do so before this Court. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986). The Separation of Powers is too important to be subject for its maintenance to the discretion of one officer.

There are, presently, few issues more in the public eye than the actions of the various independent counsel. Whether the law is wise or not, the office of an independent counsel must have some boundaries if the Executive is to remain accountable to the People for the execution of his office. This case will afford the Court an opportunity to supplement *Morrison* and to determine the extent

of the powers of independent counsel. It is the boundary of that office that is important, and this Independent Counsel has stretched that boundary beyond the limitation of the doctrine of Separation of Powers and beyond the Act itself.

We ask that the writ be granted.

(B) *As to the Removal of the District Judge:*

The District Judge was removed by the Court of Appeals on a motion by Independent Counsel, based on newspaper articles, an acquaintance between Tucker and his predecessor in the office of Governor of Arkansas, and an acquaintance between His Honor and the President and his First Lady.

Independent Counsel attacked Judge Woods over his "failure to recuse from this case". (Independent Counsel Brief to Court of Appeals, p. 45). The newspaper articles and the friendship with the President and the acquaintance between the President and Tucker were known to Independent Counsel before he argued the dismissal motion before Judge Woods, but were first raised at the appellate level, without the presentation of any motion for recusal under the statutes which allow such a motion. See 28 U.S.C. §§ 144 and 455.

Under 28 U.S.C. § 2106, the Court of Appeals granted Independent Counsel's motion to recuse, under its general authority to set the terms of the remand.

In this manner Independent Counsel was able to go forward with the District Court, find out that His Honor's views of Independent Counsel's powers were unacceptable, and then raise matters *known at the time of the argument below* to cause a recusal for the remand.

This is surely unfair to the District Court, individually, and it allows Independent Counsel to manipulate the choice of judge . . . which was, initially, decided by a computer in accord with the local practice at Little Rock.

This Court has studied the issue of recusal in recent years. *Liteky v. United States*, 510 U.S. ___, 127 L.Ed.2d 474, 114 S. Ct. 1147 (1994); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (Neither case involving a recusal on remand under 28 U.S.C. § 2106). In neither *Liljeberg* nor *Liteky* has the Court considered the scope of the offensive use of 28 U.S.C. § 2106 by a successful appellant in avoiding remand to a judge who was unacceptable to the appellant.

The importance of the issue is the independence of the District Judges and their right to pass on attacks on their own integrity, as the statutes contemplate. It is also important to other litigants, who should have the right to know, before a Judge makes a trial level decision, that the opponent has newspaper clippings that will cause a recusal and perhaps invalidate the decision.

The right of an appellate court to grant such a motion as was presented here has been challenged by a district judge in the literature of the subject. Weinstein, "*The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*", 120 F.R.D. 267 (Chief Judge, E.D.N.Y.)

This is *not* a case in which any real concern for the actual fairness of the trial judge is part of the issue. It is only a case in which counsel believes he would do better with some other judge.

Section 2601, without any language authorizing compelled recusal, has been read broadly by the Courts of

Appeal to allow a party to move offensively for recusal, without the impugned judge being given any opportunity to respond. See, e.g. *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987). This Court may wish to consider whether or not standardless removal by appellate courts is appropriate. The reasons stated in the dissent below (App. 29) would provide sufficient grounds for the writ.

## CONCLUSION

For the reasons stated, we pray that the writ of certiorari issue.

Respectfully submitted,

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# APPENDIX

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 95-3268

United States of America,

Appellant,

v.

Jim Guy Tucker; William J. Marks, Sr.;
John H. Haley,

Appellees.

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United States Department of Justice;
Sun Diamond Growers of California,

Amicus Curiae.

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Appeal from the United States District Court
for the Eastern District of Arkansas.

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Submitted: December 12, 1995
Filed: March 15, 1996

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Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

BOWMAN, Circuit Judge.

The United States, represented by Independent Counsel Kenneth W. Starr, appeals from an order of the District Court dismissing an indictment brought against Jim Guy Tucker, William J. Marks, Sr., and John H. Haley. The court ruled that the Office of Independent Counsel (OIC) has no jurisdiction to prosecute the case. We reverse.

On August 5, 1994, the Division for the Purpose of Appointing Independent Counsels (commonly known and herein referred to as the Special Division), pursuant to a request from United States Attorney General Janet Reno, appointed Starr as Independent Counsel

> to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, **relating in any way** to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

*In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994) (emphasis added).[1] The order further conferred upon Starr "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law . . . **by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.**" *Id.* at 2 (emphasis added). The OIC also was empowered to investigate any obstruction of justice "in connection with any investigation of the matters described above." *Id.* Finally, the Special Division vested in the Independent Counsel "jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any

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[1] Under 28 U.S.C. § 49 (1994), the Chief Justice appoints three judicial officers to serve two-year terms for this division of the United States Court of Appeals for the District of Columbia.

of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters." *Id.* In sum, the court ordered that the Independent Counsel "shall have prosecutorial jurisdiction to **fully investigate and prosecute** the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and **all matters and individuals whose acts may be related to that subject matter**," including crimes "that may arise out of the above described matter." *Id.* at 3 (emphasis added).

Starr succeeded Robert B. Fiske, Jr., who had been appointed by the Attorney General in January 1994 pursuant to 28 C.F.R. § 600.1 (1993) (after the 1987 statutes reauthorizing appointment of independent counsel had expired, and before the OIC was reauthorized again in June 1994), both in the position and in his scope of authority as Independent Counsel. Fiske had been appointed, in turn, to replace a team of lawyers from the fraud section of the criminal division of the Justice Department, which had taken over the Madison Guaranty Savings & Loan Association investigation in November 1993 when Paula Casey, United States Attorney for the Eastern District of Arkansas, recused herself and her staff from the investigation and prosecution of matters concerning Madison Guaranty and Capital Management Services (CMS).

By letter dated September 2, 1994, the Acting Assistant Attorney General, Criminal Division, responding to Starr's August 31 request, referred to the OIC "investigative and prosecutorial jurisdiction over . . . [w]hether any person committed any federal crime relating to the bank-

ruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No. 75-2001914, Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11)." The letter noted that the Attorney General had agreed that this matter, and another that was redacted from the record that is before us in this case, are related to the OIC's investigation. Letter from John C. Keeney, Acting Assistant Attorney General, Criminal Division, to Kenneth W. Starr (Sept. 2, 1994). The Independent Counsel sought referral, and the Attorney General granted it, pursuant to 28 U.S.C. § 594(e) (1994), which provides, as relevant here: "An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters." Out of what the Independent Counsel referred to during oral argument of this appeal as "an abundance of caution," the Independent Counsel in December 1994 also sought referral jurisdiction over the investigation and prosecution of federal criminal matters relating to the Landowners Management System (LMS) bankruptcy (among other matters) from the Special Division. On December 19, the Special Division issued an Order of Referral, a paragraph of which precisely tracks the Attorney General's September 2, 1994, referral to the OIC of all investigative and prosecutorial jurisdiction over federal criminal matters relating to the LMS bankruptcy.

The OIC's criminal investigation of matters relating to the LMS bankruptcy culminated on June 7, 1995, when a grand jury for the Eastern District of Arkansas issued

the indictment that is the subject of this appeal. Governor of Arkansas Jim Guy Tucker, his Little Rock lawyer John H. Haley, and his San Francisco business partner William J. Marks, Sr., were variously charged with tax fraud; bankruptcy fraud; making false material statements for the purpose of influencing CMS, a federally licensed management company in Arkansas; and conspiracy to commit various of these acts. The specifics of the indictment are discussed in further detail as necessary to the discussion in Part II of this opinion.

The case was assigned to Judge Henry Woods,[2] who on September 5, 1995, held a hearing on the defendants' motions to dismiss. Within a few hours, the court issued a twenty-one-page order and opinion dismissing the indictment on the ground that the OIC lacked prosecutorial jurisdiction over this case.

## I.

The Independent Counsel's first issue on appeal was addressed by the District Court somewhat summarily and with little legal analysis: whether the courts have the authority to review the Attorney General's decision under 28 U.S.C. § 594(e) to refer jurisdiction to the OIC. We review this question of law *de novo* and hold that the Attorney General's exercise of her discretion to refer matters to the OIC for investigation and prosecution is not reviewable.

An independent counsel, of course, is not an ordinary United States attorney. The counsel is appointed by the

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[2] United States District Judge for the Eastern District of Arkansas.

judiciary (the Special Division) at the behest of the Attorney General. 28 U.S.C. §§ 593(b)(1), 592(c)(1) (1994). The scope of counsel's prosecutorial jurisdiction is delineated by the Special Division. *Id.* § 593(b)(1). Counsel may be removed only by impeachment and conviction, or "by the personal action of the Attorney General and only for good cause, physical or mental disability . . ., or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* § 596(a)(1) (1994). The independent counsel law specifically provides that the United States District Court for the District of Columbia has jurisdiction to review a removal decision of the Attorney General upon petition by the ousted independent counsel. *Id.* § 596(a)(3) (1994). The Special Division, or the independent counsel, may terminate an OIC when an investigation and any resulting prosecutions are substantially completed. *Id.* § 596(b) (1994). The independent counsel is subject to congressional oversight, *id.* § 595 (1994) and must make periodic reports to the Special Division, *id.* § 594(h) (1994).[3]

The unusual nature of the office notwithstanding, a duly appointed independent counsel is a prosecutor for the United States, and prosecutorial decisions of the nature here in question—who should be prosecuted and for what alleged crimes—have long been committed to the discretion of the prosecutor.[4] "In our criminal justice

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[3] The Supreme Court has held that the independent counsel law does not violate the Appointments Clause, Article III, or the separation of powers principles of the Constitution. *Morrison v. Olson*, 487 U.S. 654 (1988).

[4] As the Supreme Court noted in *Wayte v. United States*, 470 U.S. 598, 608 (1985), a prosecutor's decisions are not free from

(continued...)

system, the Government retains 'broad discretion' as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n. 11 (1982)); *see also Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir. 1977) (per curiam) ("The authority to decide against whom federal indictments shall be sought lies almost exclusively with the United States Attorneys or the Justice Department, and their decisions in this regard are not generally subject to judicial review.")

Although prosecutorial discretion is not the precise issue here, we do not see any reason to believe that the Attorney General's referral decision is any more subject to judicial review than the usual prosecutorial decisions. But we need not rest our decision on intuition guided by a consideration of prosecutorial discretion and its unreviewability in its ordinary contexts, for the definitive answer to the question of reviewability in this case is found in legislative history that cannot be ignored (although the appellees and the District Court elected to do just that).

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[4] (...continued)
scrutiny when the challenge is to the constitutionality of those decisions, such as selective prosecution that violates the Equal Protection Clause. *See United States v. Batchelder*, 442 U.S. 114, 125 & n. 9 (1979). But there is no constitutional right of a criminal defendant to choose his or her prosecutor and thus there can be no constitutional dimension to the challenge to the prosecutor's jurisdiction when it is conceded, as it is here, that there is *some* federal prosecutor who is empowered to bring the charges on which the appellees have been indicted.

In 1987, the second time legislation establishing the independent counsel process was reauthorized, the conferees discussed the possibility of codifying the holdings of *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986), and *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984) (en banc) (per curiam) (the legislative history incorrectly referred to the case as *Banzhai v. Smith*), wherein two circuit courts of appeals "properly reflect[ed] legislative intent" by concluding "that no judicial review is available of decisions by the Attorney General not to conduct preliminary investigations." H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 22 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2185, 2188.[5] The joint statement explained, however, that such a provision was not included in the jointly proposed legislation "because the conferees did not wish to suggest, by indicating a lack of judicial review of Attorney General decisions on preliminary investigations, that judicial review might be available of other Attorney General decisions under this chapter." *Id.* Thus one might quite logically conclude that, where Congress did intend there to be judicial review of Attorney General decisions, it specifically ordained judicial review, as it did

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[5] The court in *Banzhaf v. Smith*, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (en banc) (per curiam), held "that Congress specifically intended in the Ethids in Government Act to preclude judicial review, at the behest of members of the public, of the Attorney General's decisions not to investigate or seek appointment of an independent counsel with respect to officials covered by the Act." The court in *Dellums v. Smith*, 797 F.2d 817, 823 (9th Cir. 1986), reached the same conclusion, noting its view, based on its reading of 28 U.S.C. § 595 (1994)—the provision concerning congressional oversight of the OIC—that Congress intended "that enforcement by members of congressional judiciary committees would be effective in preventing the Attorney General from refusing to obey the law."

when providing for judicial review of an Attorney General's decision to remove an independent counsel. To be certain that its point—that unreviewability of the Attorney General's decisions is the rule when the independent counsel law does not expressly provide otherwise—was not missed, the Committee stated, in no uncertain terms that "[t]he conferees agree that **an Attorney General's determination under the independent counsel law are not subject to judicial review.**" *Id.* (emphasis added). The District Court and all the appellees studiously ignore this compelling language from the legislative history, despite the fact that it was brought to their attention, evidently finding it impossible to challenge.[6] We too think it is irrefutable, and conclude that this legislative history, which confirms the conclusion one logically would reach by reading the statute, settles the question. For us to hold otherwise would subvert con-

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[6] In an apparent effort to avoid the illuminating legislative history concerning review of the Attorney General's decisions under the independent counsel law, the appellees urge that they are actually seeking (or, in addition, they are seeking) review of the Independent Counsel's decision to ask the Attorney General to refer, and his decision to accept referral of, the matters in question. This argument is specious. Any possible issue relating to counsel's decisions to seek or to accept referral in this case is mooted by the decision of the Attorney General to refer the matters in question to the jurisdiction of the Independent Counsel. The contentions that it is the referral from the Special Division that is challenged here and that the courts may review that referral strike us as being even more specious, but in fact we need not and do not consider them. Referral by the Special Division, as noted above, was redundant and unnecessary. Given that the Attorney General has authority to make the referral independently, and did so here, the additional, identical referral by the Special Division, though it may be a source of additional comfort to the OIC, is a moot point in this appeal.

gressional purpose in creating and empowering the independent counsel and in structuring the office as it did.

*United States v. Juvenile Male*, 923 F.2d 614 (8th Cir. 1991), to which the appellees direct our attention for the proposition that the Attorney General's referral is reviewable, is inapposite. In *Juvenile Male*, the issue was the reviewability of the Attorney General's decision to certify, under the Juvenile Justice and Delinquency Prevention Act, that the crime with which a juvenile was charged as a "crime of violence." The Court held that the certification in question was reviewable. *Cf. United States v. C.G.*, 736 F.2d 1474 (11th Cir. 1984) (holding certification under the Act that appropriate state court did not have jurisdiction was not reviewable); *United States v. Vancier*, 515 F.2d 1378 (2d Cir.) (same), *cert. denied*, 423 U.S. 857 (1975). We stated, "While this court may not have the power to guide a federal prosecutor's discretion, we must insure that the exercise of that discretion is within the confines" of the statute. *Juvenile Male*, 923 F.2d at 617-18. The argument that the *Juvenile Male* holding is applicable here ignores the definitive legislative history of the law reauthorizing the OIC that clearly evidences Congress's intent that (unless otherwise provided in the statute) the Attorney General's decisions under the independent counsel law are nonjusticiable. Further, the question whether a juvenile has been charged with a "crime of violence" is easily reviewed by a court and is well within the expertise of the judiciary. The "relatedness" determination at issue here, on the other hand, is an exercise of a discretion that only the prosecutor and the Attorney General command, because of their intimate knowledge of the course of the investigation, including witness statements, and of other pro-

ceedings that may be ongoing before the grand jury. That is, the "relatedness" question is largely without the standards that the judiciary typically requires for review, another reason for entrusting it, as Congress has, to the broad (and unreviewable) discretion of the Attorney General.

Reliance on *Gutierrez de Martinez v. Lamagno*, ___ U.S. ___, 115 S. Ct. 2227 (1995), in support of the appellees' position also is misplaced. *Gutierrez* was a case decided under the terms of the Westfall Act, which authorizes the Attorney General to certify that a federal employee sued for a wrongful or negligent act was acting within the scope of employment at the time of the alleged act, so that the United States is substituted for the defendant. In the ordinary case, such certification would allow a plaintiff to maintain an action under the Federal Tort Claims Act (FTCA), although because of an exception to the FTCA the result in *Gutierrez* was just the opposite, and the United States retained its sovereign immunity from suit. The issue in *Gutierrez* was the reviewability of that certification. The Court noted two factors that "weigh[ed] heavily" in its analysis: that 'the Attorney General herself urge[d] review," and that review is generally available "when a government official's determination of a fact or circumstance . . . is dispositive of a court controversy." *Id.* at ___, 115 S. Ct. at 2231.

Neither factor is present here. In this case, the Department of Justice, as amicus curiae, agrees with the Independent Counsel that the Attorney General's referral is not reviewable. Further, as is apparent from the District Court's unchallenged acknowledgement that these defendants properly may be prosecuted by the United States Attorney for the Eastern District of Arkansas (who has

recused herself from matters concerning CMS) or by the Attorney General (who made the referral to the OIC), the Attorney General's referral does not "instruct[ ] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at ___, 115 S. Ct. at 2234. The absence of judicial review of the discretionary referral decision merely allows the prosecution to proceed without the delay that judicial review inevitably would entail; it does not direct the outcome of the prosecution. Further, unlike the situation in *Gutierrez*, this is not a case where the Attorney General has a vested interest in the referral such that she "is hardly positioned to act impartially." *Id.* at ___, 115 S. Ct. at 2233.

At oral argument we were directed to the admonition of the *Gutierrez* Court that "judicial review of executive action 'will not be cut off.' " *Id.* at ___, 115 S. Ct. at 2231 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140 (1967). But considering our reading of the independent counsel law and the uncontroverted legislative history we have discussed above, the full, unabridged language of the Court does not support the appellees' position, and actually supports our holding that the Attorney General's referral decisions are nonjusticiable: "Accordingly, we have stated time and again that judicial review of executive action 'will not be cut off **unless there is persuasive reason to believe that such was the purpose of Congress**.' " *Id.* (emphasis added). It is fair to say that the "reason to believe" here is more than just "persuasive," it is beyond reasonable dispute.

Accordingly, we hold that the Attorney General's referral decision under § 594(e) is not reviewable and that the District Court erred in holding otherwise.

II.

Even if the courts had jurisdiction to review the Attorney General's "relatedness" determination under § 594(e), which in Part I of this opinion we have held the courts do not have, we nevertheless would reverse the District Court, which reviewed the "relatedness" issue and disagreed with the Attorney General's determination. We begin our discussion of "relatedness" with a look at the factual basis, according to the indictment, for the charges against Tucker, Marks, and Haley.

The grand jury's indictment of June 7, 1995, was the culmination of an investigation that began on Independent Counsel Fiske's watch. The indictment alleged that Tucker and Marks made false material statements to CMS for the purpose of securing a $300,000 loan. Tucker and Marks represented to CMS that the loan was for investment in D & L Telecommunications, Inc., when in fact it was used as part of the cash collateral pledged for a personal loan of $8.5 million from Fleet National Bank. Allegedly, $6 million of that loan was used to purchase controlling interest in Planned Cable Systems Corporation (PCS), a cable television company in which Marks, who was president of the company, already was a minor shareholder. According to the indictment, Haley acquired a "shelf" corporation, that is, one with no assets or operations, in Texas, called LMS. The appellees merged PCS into LMS and Marks was named president. In November 1987, LMS filed a fraudulent bankruptcy in the Northern District of Texas. The proposed reorganization plan, approved by all creditors listed in the bankruptcy schedules before LMS even filed its bankruptcy petition, transferred valuable cable television assets to Tucker, the only secured creditor listed, and to a corporation controlled by

Tucker, listed as an unsecured creditor. The indictment alleges that this scheme was undertaken to avoid paying $4 million in taxes that would have been owed on a sale of the cable television assets.

Also relevant here is an indictment from the same grand jury handed down on August 17, 1995, after the arguments on the question of dismissal had been briefed to the District Court. The indictment charged Tucker, James McDougal, and Susan McDougal with fraudulent loan schemes involving Madison Guaranty and CMS.

As we mentioned in our discussion in Part I, "relatedness" in the context at issue here is an essentially standardless concept and, as the statute is written, one that is exceedingly broad. Section 594(e) requires only that referred matters be "related to the independent counsel's prosecutorial jurisdiction." The term "related" is undefined and without parameters. Congress did not indicate the degree of consanguinity between matters that should be evident before jurisdiction may be properly asserted by the OIC (further indication, we might add, that it was to be a determination entrusted to the discretion of the Attorney General). We also think it is relevant to note that the original jurisdiction of this OIC, which is not at issue here, includes authority "to investigate other allegations or evidence of violation of any federal criminal law . . . **by any person or entity developed during the Independent Counsel's investigation** referred to above **and connected with** or arising out of **that investigation**."[7] *In re Madison Guar. Sav. & Loan Ass'n*,

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[7] The appellees seem to contend in parts of their argument that the Independent Counsel is relying on "arising out of"

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Div. No. 94-1, Order at 2 (emphasis added); *see also* 28 U.S.C. § 593(b)(3) (1994) (scope of prosecutorial jurisdiction). Arguably, the prosecutions at issue fall within the broad grant of original prosecutorial jurisdiction without a referral even being necessary. *See United States v. Wilson*, 26 F.3d 142, 148 (D.C. Cir. 1994) ("[T]he scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders."), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1430 (1995). Even so, the OIC sought and received a referral from the Attorney General, which set forth with specificity the additional criminal matters to be investigated and possibly prosecuted by the OIC.

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[7] (...continued)
jurisdiction, as set forth in two places in the original grant of jurisdiction, for his referral jurisdiction. *See also* 28 U.S.C. § 593(b)(3) (1994) (scope of prosecutorial jurisdiction "shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter"). They argue that the "arising out of" language concerns the investigation or prosecution of a crime committed as a direct result of the OIC's investigation or prosecution, that is, an obstruction of justice crime such as perjury. We need not decide whether "arising out of" as variously used in the original grant of jurisdiction should be so narrowly interpreted, as the OIC has jurisdictional authority to investigate and prosecute not only obstruction of justice crimes related to his grant of authority but Counsel's investigation . . . and connected with or arising out of that investigation." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1, Order at 2 (D.C. Cir. Sp. Div. Aug. 5, 1994) (emphasis added). Further, in order to acquire referral jurisdiction over a matter, the OIC does not need to rely on either the "arising out of" or the "connected with" language to justify his request; the referred matters need only be "related." 28 U.S.C. § 594(e) (1994).

Considering the open-ended phrasing of § 594(e) and the expansive jurisdiction originally granted the OIC, be believe that the association between the original jurisdiction and the jurisdiction sought via referral need not be as intimate as the appellees suggest.[8] The appellees argue that the matters must be "demonstrably related" in order for referral jurisdiction to be proper. That language is excerpted from *Morrison v. Olson*, 487 U.S. 654 (1988), wherein the Supreme Court addressed the constitutionality of the independent counsel provisions of the Ethics in Government Act. Reference to the Court's entire discussion, however, makes it clear that the Court was not delimiting "relatedness" for the purpose of referral jurisdiction. Instead, the Court was observing that, due to the temporary nature of the OIC, "the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place," Congress properly conferred upon the Special Division the authority "to define the scope of the office." *Id.* at 679. The Court went on:

> This said, we do not think that Congress may give the Division *unlimited* discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demon-

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[8] We reject the suggestion that the OIC has disavowed any relation between the indictment in this case and the Independent Counsel's original jurisdiction. We agree with the OIC that this is an obvious distortion of the Independent Counsel's position, which from the initial request for referral always has been that the matter with respect to which the OIC sought referral and the original grant of jurisdiction are indeed related within the meaning of the statute.

> strably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

*Id.* It is clear that the limitation in question (assuming, as do the appellees, that "demonstrably related" is a genuine limitation) was upon the authority of the Special Division to define jurisdiction in the first instance, and was the result of the constitutional concerns (appointments clause and separation of powers) generated by Congress's decision to vest executive powers in the judiciary (the Special Division). "Demonstrably related" is not, as Marks asserts, "[t]he applicable legal standard for evaluating whether the Independent Counsel has authority to prosecute the instant case." Brief of Appellee Marks at 13. We do not agree that the subject matter of the referral jurisdiction must be "demonstrably related" either " 'to the factual circumstances' that give rise to the appointment," Brief of Appellee Tucker at 10, or "to the subject matter of the Independent Counsel's jurisdiction," Brief of Appellee Marks at 13.[9] We thus reject the appellees' contention that the subject matter of the referral jurisdiction is required to relate to James McDougal's or President Clinton's or Mrs. Clinton's relationship to CMS or Madison Guaranty or the Whitewater Development, which is the subject matter of the Independent Counsel's original investigatory jurisdiction. If that were the test for a proper referral, then referral never would be necessary and § 594(e) would be superfluous. We think it is

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[9] Haley simply argues that the independent counsel law and *Morrison* "require that matters to be referred must be 'demonstrably related,' " Brief of Appellee Haley at 5, although to what they must be so related is not stated.

clear that, contrary to the appellees' arguments, relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred.

The matters over which the OIC sought referral jurisdiction were developed during the investigation conducted by the OIC under the original grants of jurisdiction, first the jurisdiction of the regulatory Independent Counsel (Fiske) and then the statutory Independent Counsel (Starr). It is apparent from the record before us, even though grand jury proceedings to which we are not privy continue, that there is overlap in witnesses and in defendants between the original prosecutorial jurisdiction (*see* August 17, 1995, indictment) and the referral jurisdiction (*see* June 7, 1995, indictment). Further, as the August 17 indictment demonstrates, there is a clearly defined relationship between Tucker (referral) and McDougal (original), Tucker (referral) and CMS (original and referral), and Tucker (referral) and Madison Guaranty (original). (CMS was an entity named in the original grant of jurisdiction and allegedly defrauded by the activities charged in the August 17 indictment, and material false statements to CMS by Tucker and Marks constitute a part of the charges in the June 7 indictment.) We have no difficulty in concluding that the required relatedness between original and referral jurisdiction is present here.

The appellees further argue that they are not "persons" within the meaning of 28 U.S.C. § 591 (1994) who can be investigated by the OIC, and therefore they cannot be prosecuted by the OIC for wrongdoing. The covered "persons" described by § 591(b) are high-ranking federal executive officials and national campaign committee offi-

cers. Tucker, Marks, and Haley are outside the definition. But § 591(b) refers to persons to whom § 591(a) applies, and § 591(a) sets out the requirement of a preliminary investigation by the Attorney General:

> The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law. . . .

Thus it is the alleged culpability of a covered "person" that may require the Attorney General to conduct an initial preliminary investigation. But the ultimate scope of jurisdiction of the OIC—whom he may investigate and whom he may prosecute—as determined by the Special Division, is not necessarily limited to covered persons, and neither is referral jurisdiction. Moreover, referral jurisdiction requires only relatedness to the original prosecutorial jurisdiction; nowhere do the OIC provisions require that a § 591 preliminary investigation into the involvement of covered persons be conducted before a matter may be referred to an existing OIC. Finally, the appellees' argument is in any event inapposite to their case, for here the Attorney General originally sought the appointment and prosecution would present a "political conflict of interest," not because covered persons are targets.

The appellees also argue that the Independent Counsel was, in reality, seeking expansion jurisdiction, not referral jurisdiction, and that he did not comply with the requirements of expansion jurisdiction, or, in the alternative, that he should have sought expansion jurisdiction instead of referral jurisdiction. Expansion jurisdiction may be granted to the OIC by the Special Division upon

the request of the Attorney General, if possible violations of criminal law by § 591(b) "covered persons" that are outside the prosecutorial jurisdiction of the OIC come to the attention of the independent counsel. 28 U.S.C. § 593(c) (1994). If, after a 28 U.S.C. § 592 (1994) preliminary investigation, the Attorney General determines that further investigation is warranted, the Special Division then must either expand the existing OIC's jurisdiction or appoint another independent counsel. The argument that the Independent Counsel and the Attorney General failed to comply with the requirements of § 593(c) (expansion jurisdiction) is irrelevant to this case, because in fact the Independent Counsel did not seek expansion jurisdiction. He clearly sought—and received—referral jurisdiction under § 594(e), obviating any need to comply with the requirements for expansion jurisdiction. As for the contention that the Independent Counsel should have sought expansion jurisdiction in the first place, and not referral jurisdiction, our decision that referral was proper because the referred matter is related to the Independent Counsel's prosecutorial jurisdiction renders this argument moot.

Assuming for the sake of argument that the discretion exercised by the Attorney General in referring "related" matters to the OIC is reviewable, and giving the Attorney General the deference that is due such discretionary decisions, we hold that she did not abuse her discretion in determining that the subject matter of the referral jurisdiction in this case is "related" to the Independent Counsel's original prosecutorial jurisdiction within the meaning of 28 U.S.C. § 594(e). The OIC has jurisdiction to prosecute this case.

III.

We come now to the Independent Counsel's request that this case be assigned to a judge other than Judge Woods upon remand to the District Court. We conclude that this request must be granted to preserve the appearance of impartiality.

The Independent Counsel relies primarily on newspaper articles to support his request.[10] First, there are articles that connect Judge Woods and Hillary Rodham Clinton. Judge Woods appointed her as counsel for a special committee in the Pulaski County, Arkansas, school desegregation case, and was quoted as saying that he "did work with Hillary" and that he "came to admire her during that period." Rex Nelson, *Road to Tucker trial full of twists for Judge Woods*, Ark. Democrat-Gazette, Sept. 3, 1995, at 1A, 20A; *see also* Connie Bruck, *Hillary the Pol*, New Yorker, May 30, 1994, at 58, 69. In the Arkansas Democrat-Gazette article, the newspaper reported that Judge Woods said, "If anything came up regarding President Clinton, I would recuse," because of the Judge's relationship with Hillary Clinton. Nelson, *supra*, at 20A. A column in a daily periodical with national—actually international—circulation reported that Judge Woods wrote to then Deputy White House Counsel, the late Vincent Foster, in July 1993 to ask whether he should grant an interview where the topic was to be Hillary Rodham Clinton. Micah Morrison, *Arkansas*

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[10] In order to adequately consider the Independent Counsel's argument for reassignment, once having determined that his request is properly ours to grant, *see infra*, we asked the OIC to supplement the record by providing to the Court copies of the articles upon which he relies.

*Judge Runs the Clock on Whitewater*, Wall St. J., Oct. 4, 1995, at A14. Finally, in a column criticizing efforts "to get federal Judge Henry Woods, a Democratic appointee, off Gov. Jim Guy Tucker's criminal case," the author acknowledged, "Indeed, the judge spent the night at the White House the night Republicans swept a majority of Congress last November." Max Brantley, *Political notebook*, Ark. Times, June 30, 1995, at 16.

For their part, President and Mrs. Clinton have been reported to have expressed continued support for Tucker since his indictment by the grand jury. It was reported in an article on the front page of the Arkansas Democrat-Gazette that, the day after Tucker pleaded not guilty to the charges in this case, the Clintons attended a fund-raising luncheon in Little Rock, Arkansas, where Tucker received a "sustained standing ovation." Noel Oman & Peter Aronson, *Clinton lunch also a feast for Tucker*, Ark. Democrat-Gazette, June 24, 1995, at 1A. At the event, solidifying his connection with the recently indicted Tucker, the President said in a speech, "I am especially glad to see Governor and Mrs. Tucker here today and especially grateful for the reception you gave them." *Id.* at 12A. Tucker also acknowledged the perceived connection when he was quoted in an interview as saying of the OIC, "I think that's been much of their goal, to try to tar the [P]resident with images of wrongdoing here in his home state." *Inside Politics* (Cable News Network, Inc., television broadcast, June 21, 1995).

The appellees object to the Independent Counsel's request on several grounds, among them: that the issue was not raised in the District Court and is raised now only because the Independent Counsel did not like the result reached in the proceeding below; that "the motion

is . . . frivolous because it is obviously premature to raise such a motion in an appellate court," Brief of Appellee Marks at 38; that Judge Woods's political affiliation, and the Independent Counsel's affiliation with another political party, comprise the basis for the argument; and that the argument is "an improper vehicle for the publication of a personal attack on Judge Woods for the purpose of distracting this Court from a proper review of the district court's dismissal ruling on its merits," *id.* Most of the appellees' claims are undeserving of comment, and we summarily reject the suggestion that appellant's brief is evidence that Judge Woods's political persuasion forms the basis for the Independent Counsel's request. Nowhere do the appellees give us reasons for concluding that the matters the Independent Counsel has brought to our attention do not create an appearance of bias.

We also reject the contention that the Independent Counsel's request is improperly made to this Court in the first instance rather than to Judge Woods. The appellees' arguments stem from their confusion about the source of our power to grant the OIC's request. "Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances,' 28 U.S.C. § 2106." *Liteky v. United States*, ___ U.S. ___, ___, 114 S. Ct. 1147, 1156-57 (1994). Thus we are empowered to "direct the entry of such appropriate . . . order . . . as may be just under the circumstances," 28 U.S.C. § 2106 (1994), including reassignment of the case where, in the language of 28 U.S.C. § 455(a) (1994), the district judge's "impartiality might reasonably be questioned." *See Davis v. Lockhart*, 705 F.2d 993, 997-98

(8th Cir.) (remanding to another district judge to assure the appearance of impartiality, notwithstanding that appeal was from court's failure to recuse *sua sponte* and the issue was never raised in the district court), *cert. denied*, 464 U.S. 982 (1983).

The Independent Counsel does not seek review of Judge Woods's failure to disqualify himself under 28 U.S.C. § 144 (1994), which requires the party seeking bias with the district judge that he wishes to be disqualified. Unlike § 144, § 455 sets forth no procedure for seeking recusal in the district court. *See Liteky*, ___ U.S. at ___, 114 S. Ct. at 1153 (as distinguished from § 144, § 455 "place[s] the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit"). The appellees' reliance on either the language of § 144 or on cases interpreting § 144 is misplaced.

Further, the Eighth Circuit cases cited by the appellees are distinguishable. *See United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994) ("This Court has held that claims under § 455 'will not be considered unless timely made.' ") (quoting *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir. 1992)). This is not a case like *Bauer* and *Holloway* where actual bias under § 455(b) is alleged, and where a judge arguably should have an opportunity first to answer charges of partiality. *See* 28 U.S.C. § 455(b) (1994) (requiring recusal in cases of actual biases, conflicts of interest, and where certain relatives of the judge are involved in the proceedings before the court). Nor is the Independent Counsel seeking to have the judgment vacated on appeal as a remedy for the judge's failure to recuse. In fact, the Independent Counsel seeks no appellate review at all. Rather, he asks to

have the case reassigned to a judge other than Judge Woods, under the § 2106 powers of this Court, in the event we reverse the dismissal of the indictment and remand the case for trial. The Independent Counsel made his request for reassignment in his appellant's brief. Under § 2106, that is all that is required to make the request timely.

We turn now to the merits of the OIC's request. Under § 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Gray v. University of Ark.*, 883 F.2d 1394, 1398 (8th Cir. 1989). Section 455(a) "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg v. Health Servs. Acquisitions Corp.*, 486 U.S. 847, 858 n. 7 (1988). In determining, then, whether remand to a different district judge is warranted to achieve the goal of ensuring "the *appearance* of impartiality," we apply "an objective standard of reasonableness." *United States v. Poludniak*, 657 F.2d 948, 954 (8th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). It is the appearance of bias or partiality that matters here, not actual bias.

The Independent Counsel argues that, because of the "unmistakable appearance" of bias or partiality here, "[r]eassignment is necessary to preserve the appearance and reality of justice." Brief of Appellant at 42. We agree. Based on the information before us in this case, we conclude that the risk of a perception of judicial bias or partiality is sufficiently great so that our proper course is to

order reassignment on remand.[11] As we have discussed, Judge Woods's link with the Clintons and the Clintons' connection to Tucker have been widely reported in the press. Moreover, as the Independent Counsel has noted, "this case will, as a matter of law, involve matters related to the investigation of the President and Hillary Rodham Clinton." Reply Brief of Appellant at 25. Given the high profile of the Independent Counsel's work and of this case in particular, and the reported connections among Judge Woods, the Clintons, and Tucker, assignment to a different judge on remand is required to insure the perception of impartiality.

As a practical matter, there is no shortage of other judges in the Eastern District of Arkansas to whom this case may be assigned. Apart from whatever time Judge Woods spent in ruling on the motion to dismiss the indictment, judicial resources have not been expended on

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[11] The Independent Counsel also directs our attention to certain comments in the District Court's opinion, which were reported in the local Arkansas press, that, in the view of the OIC, "displayed hostility to the Independent Counsel system." Brief of Appellant at 46-47. We do not consider these comments to be persuasive evidence of a perceived bias or partiality.

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

*Liteky*, ___ U.S. at ___, 114 S. Ct. at 1157. We conclude that the passages referred to by the OIC, standing alone, would not cause a reasonable person to doubt Judge Woods's impartiality.

the case and neither judicial, prosecutorial, nor defense efforts will have to be duplicated when the case is reassigned. The OIC's request for reassignment is granted, not because we believe Judge Woods would not handle the case in a fair and impartial manner (we have every confidence that he would), but only because we believe this step is necessary in order to preserve the appearance as well as the reality of impartial justice.

IV.

We have taken with the case Marks's motion to strike portions of appellant's brief and appendix, which according to Marks contained "Offending Materials."

We first reject, without lengthy comment, the contention that any part of the appellant's brief raised frivolous arguments or that the brief "reflects a considered decision by the Independent Counsel to attack Judge Woods personally rather than to address the correctness of the trial court's decision on its legal merits." Motion to Strike and Brief in Support Thereof at 12-13. As we have concluded in this opinion, not only are the Independent Counsel's arguments not frivolous, they are meritorious, and the bulk of his brief is indeed devoted to "address[ing] the correctness of the trial court's decision on its legal merits." In any case, Marks need not be concerned that we so easily could be distracted from our duty to review the merits on an appeal that is properly before us. Throughout his motion, Marks mischaracterizes Independent Counsel's advocacy, and comes perilously close to having filed a frivolous motion.

As for the materials that Marks claims have no business being cited in appellant's brief or being included in

appellant's appendix, we conclude that they are either documents properly in the record in this case; legal authority properly cited to the Court; or publicly filed or disseminated documents or articles of which we properly may take judicial notice. Here, too, Marks's argument is devoid of merit.

The motion is denied.

V.

The judgment of the District Court dismissing the indictment for lack of prosecutorial jurisdiction is reversed and the case is remanded for trial. The Independent Counsel's motion for reassignment of the case is granted, and the Chief Judge of the United States District Court for the Eastern District of Arkansas is instructed to see that the case is assigned to a judge other than Judge Woods. Marks's motion to strike portions of the Independent Counsel's brief and appendix is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 95-3268EA [Dated May 6, 1996]

United States of America,

Appellant,

vs.

Jim Guy Tucker; William J. Marks, Sr.;
John H. Haley

Appellees.

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United States Department of Justice;
Sun Diamond Growers of California,

Amicus Curiae.

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Appeal from the United States District Court
for the Eastern District of Arkansas

[PUBLISHED]

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The suggestions for rehearing en banc are denied. Judge McMillian and Judge Murphy would grant the suggestions for rehearing en banc. Judge Hansen would grant the suggestions for rehearing en banc to the extent the suggestions raise the issue of the disqualification of Judge Woods.

The petition for rehearing by the panel is also denied.

Chief Judge Richard S. Arnold and Judge Morris Sheppard Arnold took no part in the consideration or decision of this case.

MCMILLIAN, Circuit Judge, dissenting, with whom MURPHY, Circuit Judge, joins.

Neither law nor fact supports the panel's decision to disqualify Judge Henry Woods from presiding at the trial of *United States v. Jim Guy Tucker*. Judge Woods is one of this circuit's most experienced and respected trial judges. He has served his community, his state, and his nation with distinction for more than fifty-six years. For a panel of this court to disqualify Judge Woods "to preserve the appearance of impartiality" is a disservice to the federal judiciary. To do so on the basis of newspaper and magazine articles and without the issue having been raised in district court, giving Judge Woods an opportunity to respond, compounds the indignity.

Because we believe that this decision not only demeans the reputation of an honorable member of the federal judiciary, but incorrectly applies the clearly established procedural, evidentiary, and substantive standards required by 28 U.S.C. § 455(a), we believe that this court should rehear this case en banc and reverse the panel's decision. Therefore, we dissent from its decision to deny the suggestion for the petition for rehearing en banc.[1]

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[1] Although this dissent focuses upon Judge Woods' disqualification, the panel opinion, in holding that the judiciary lacks jurisdiction to review the scope of the authority of the special prosecutor, commits fundamental error. It fails to separate the unauthorized review of the special prosecutor's exercise of discretion from the scope of the special prosecutor's statutory authority. *See Morrison v. Olson*, 487 U.S. 654, 684 (1988) ("We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act."); *cf. United States v. Juvenile Male*, 923 F.2d 614, 618 (8th Cir. 1991) ("While this

(continued...)

The panel concedes that there are no past or present political or social relationships between Judge Woods and defendant Tucker. Yet, based on the allegations printed in various newspaper articles, the panel concludes that the reported friendship between Judge Woods and the Clintons in conjunction with the Clintons' occasional political association with defendant Tucker creates an "unmistakable appearance" of bias or partiality. As a consequence of this conclusion, the panel disqualifies Judge Woods and remands the case for reassignment. This standard lacks any precedential or statutory foundation and establishes an unworkable guideline defining what constitutes the appearance of partiality.

Although this court has on occasion invoked its power to reassign a case, it has done so sparingly and only where our court was presented with unusual circumstances. *See, e.g., Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976). By contrast, the panel's exercise of its supervisory power in response to the Independent Counsel's request, which failed to present a basis for procedural exemption, deviates from our court's precedent both with respect to the disqualification standard as well as the process by which disqualification requests must be made. More importantly, the panel's venture into unchartered waters establishes a dangerous precedent that is not only difficult to reconcile with this court's past decisions, but will return to haunt us in the future. In particular, we object to the unusual procedural departure

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[1] (...continued)
court may not have the power to guide a federal prosecutor's discretion, we must ensure that the exercise of that discretion is within the confines of section 5032.").

employed by the panel to reach the merits of a request not first brought before the district court in a timely fashion. We also protest the evidentiary foundation on which the panel concludes that an "unmistakable appearance" of partiality exists and the unusual process by which that evidence was introduced. Finally, we reject the standard applied to Judge Woods—i.e., a friend of a friend creates an impermissible appearance of bias—as without precedential support and unworkable. Because of the importance of the issues, we address the grounds for each of our objections below.

*A. The Procedural Requirements for Section 455.*

This court has repeatedly held that section 455[2] recusal

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[2] 28 U.S.C. § 455 (1994) provides in relevant part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of-the particular case in controversy;

(continued...)

raising the recusal issue only after learning the court's ruling on the merits."), *cert. denied*, 481 U.S. 1016 (1987).

The Independent Counsel's tardy request confronts this court with just such considerations. The Independent Counsel was undoubtedly aware of the connections he cited as the basis for his request prior to the hearing before Judge Woods.[3] Yet, he did not bring the matter to the attention of Judge Woods, or to any court, until after Judge Woods had made his unfavorable ruling. The failure to move for a judge's recusal in a timely fashion is grounds for its denial. *See In re Apex Oil Co.*, 981 F.2d 302, 304 (8th Cir. 1992). Moreover, the timing of the motion to recuse Judge Woods, after the Independent Counsel suffered the adverse ruling, renders the request

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[2] (...continued)

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

[3] Most of the articles cited by the panel as the evidentiary foundation for its decision were published before the September 5, 1995 hearing before Judge Woods. The substance of those articles is presumed to be known as of the date of publication. *See Miller v. Tony & Susan Alamo Found.*, 924 F. 2d 143, 147 (8th Cir. 1991) ("[T]he matter was known to the defendants when newspaper articles, which constituted the entire basis for the defendants' motion, were published . . . .").

suspect as a litigation strategy rather than an ethical concern. To this extent, observers could feel the Independent Counsel has politicized this case in an effort to draw a different judge.

In the face of overwhelming precedent, the panel distinguishes the present case by asserting that the timeliness requirement is limited to motions made pursuant to section 455(b). The panel cites no authority for this proposition. Although distinctions between sections 455(a) and 455(b) exist, *see Liteky v. United States*, 114 S.Ct. 1147, 1163 (1994) (Kennedy, J. concurring), this court has never before recognized a distinction between the two sections with respect to timeliness; for example, when denying a criminal defendant's post-conviction motion to disqualify, the *Holloway* panel referred to the implicit timeliness requirements of section 455, making no effort to limit this requirement to 455(b). *Holloway*, 960 F.2d at 1355. There is simply neither statutory language nor legislative history nor judicial precedent to support the panel's distinction. Quite to the contrary.

Because section 455 includes no express procedural provisions, courts have developed the appropriate procedures by judicial construction. *Id.* In addition to the fact that the timeliness requirement has been applied to both 455(a) and 455(b) by this and other circuits, *see. e.g.*, *In re Apex Oil Co.*, 981 F.2d at 304; *Yonkers Bd. of Educ.*, 946 F. 2d at 183, analysis of the statute's operation and language compels a conclusion converse to that drawn by the panel; if any portion of section 455 requires that a motion be timely made, it is section 455(a). Although the panel asserts that in instances of alleged actual bias "a judge arguably should have an opportunity first to answer the charges of partiality," the real need

for a judge to respond lies with a section 455(a) inquiry into the appearances of partiality. Section 455(b) delineates, in clear terms, "instances where actual bias is assumed" and disqualification is required. *Liteky*, 114 S. Ct. at 1163 (Kennedy, J. concurring). Thus, if the judge is the spouse of a party to the proceeding, see 28 U.S.C. § 455(b)(5)(i), the judge must be disqualified. By contrast, section 455(a) requires disqualification "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Clearly, it is the investigation into perceptions and the reasonableness of those perceptions, not an inquiry into the existence of a carefully defined relationship, that requires the relevant facts and explanations from all sides.

Furthermore, the statutory language of another 455 paragraph also supports the proposition that section 455(a) requires a timely motion. Section 455(e) provides:

> No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455(e) (1994). The fact that 455(a) may be waived and 455(b) may not be waived corroborates what can be inferred from the different nature of the two inquiries: timeliness of the recusal request is less important in the case of 455(b). In effect, the panel's interpretation of section 455 creates a broader, implicit waiver under 455(b), the section for which waiver is statutorily precluded, than that which is provided by express statu-

tory language for 455(a).[4] There is no dispute that this court has held that section 455 motions must be timely made. *Holloway*, 960 F.2d at 1355. Having done so, this court inexplicably limits that requirement to the paragraph of section 455 that least demands such a procedural safeguard.

Although it analyzes the merits of the Independent Counsel's request to disqualify Judge Woods under the rubric established by section 455(a), the panel suggests that it is not acting pursuant to its appellate powers under that statute, but rather pursuant to the powers conferred on appellate courts by 28 U.S.C. § 2106.[5] Although we do not dispute this court's power to reassign a case in accordance with its supervisory power, this power has been reserved in the past to unusual cases in which compliance with procedural requirements might be excused. *See In re International Business Machines Corp.*, 45 F. 3d at 643 (invoking its § 2106 power to reassign a case after the district court judge denied a motion to recuse and underlying litigation deferred pending

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[4] This is not to say that the Independent Counsel waived his right to seek disqualification. Given that the issue was not raised before the district court, there is no record of disclosure or waiver. This consideration is merely another indication that the panel's interpretation of 455(a)'s procedural requirements is at odds with the statute's structure.

[5] 28 U.S.C. § 2106 (1994) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

motion for a writ of mandamus). The panel mistakenly cites *Dyas v. Lockhart*, 705 F.2d 993 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983), as authority for its action. Although this court did reassign the *Dyas* case, the facts in that case were quite different from those presented here. In *Dyas*, Judge Roy had dismissed a habeas petition regarding a fair-trial issue that she had previously decided as a state supreme court judge. *Id.* at 995. We made no explicit findings regarding the appearance of impartiality; instead, we reassigned the case because the judge indisputably had preconceived ideas about the issue to be decided. There is nothing about the Independent Counsel's request that could provide a basis for disregarding normal procedures in this case. Thus, the panel's decision suggests that the procedural requirements may be ignored because litigants may raise the issue directly with the appellate court pursuant to its section 2106 powers. Not only is this proposition at odds with this court's many holdings regarding procedural requirements, it is contrary to the norms of judicial process and the dignity of federal district court judges.

There is good reason for requiring that motions for recusal be made to the district court judge in a timely fashion. Under the procedure employed in this case, the appellate panel had no choice but to decide the reasonability of questions regarding impartiality based on newspaper articles asserting various friendships and reporting that defendant Tucker believes that his investigation is part of a political smear campaign against the President of the United States. This court has always taken a strong stance in upholding the dignity and autonomy of district court judges. To now hold that a judge need not be provided with an opportunity to re-

spond to allegations impugning his ability to be impartial contradicts this strongly-held principle.

*B. The Evidentiary Foundation*

Even if the Independent Counsel had made a timely disqualifications motion, the panel bases its "appearance of partiality" determination on evidence that was not properly before the court on appeal and lacked sufficient reliability.

*1. Supplementing the Record*

In considering the Independent Counsel's motion for the disqualification of Judge Woods, the panel asked the Independent Counsel to supplement the record by providing the court with copies of the media reports upon which he had based his motion. Although it is within a district court's discretion to reopen a record for evidentiary supplementation, *see Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971); *Briscoe v. Fred's Dollar Store, Inc.*, 24 F.3d 1026, 1028 (8th Cir. 1994); and an appellate court may remand an issue to the district court for an appropriate evidentiary hearing to develop the record, *see Easley v. University of Mich. Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988), the panel rejected this course of action. Instead, it asked one party to submit evidence regarding an issue raised for the first time on appeal. The items contained in the supplement were never tested by normal evidentiary standards. Although the panel was undoubtedly acting out of concern for judicial economy, the method by which it developed the record that formed the basis of the panel's decision is contrary to evidentiary rules and precedent.

*See Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995) (the court's "unilateral pursuit of evidence without affording the parties the standard prophylaxis . . . generally obtain[ed] at trial" warrants reversal).

*2. Reliability of the Evidence*

Not only was the inclusion of the media reports into the record improper, the reports themselves are a source of information insufficiently reliable to form the sole basis for the panel's "appearance of partiality" determination. In the context of section 455, this court has been extremely skeptical of press reports as a basis for a finding of partiality. *See, e.g., United States v. Darden*, 70 F.3d 1507, 1536 (8th Cir. 1995) (district court's in-court explanation of its remarks quoted in a newspaper article negated implication of judicial bias); *Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 146-147 (8th Cir. 1991) (untimely-submitted newspaper articles deemed "rank hearsay and demonstrably inaccurate"). These cases, and others, have recognized the great potential for the media to generate inaccurate or misleading information. *See United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993) (reporters' personal opinions or characterizations appearing in the media ordinarily should not satisfy the requirements for disqualification under § 455(a)); *Easley*, 853 F.2d at 1356, n.4 (quoted statements in isolation can misrepresent the tenor of an entire interview or misconstrue a person's intentions). Although the appearance of partiality can result from press reports, it does not necessarily follow that there is a direct correlation between the publication of an allegations and the perceptions of the reasonable public. Moreover, it is injudicious to permit the perceived impartiality of a judge to be held

hostage by the writings or reporting of the media without concern for the accuracy of those reports or potential explanation.

The panel disqualifies Judge Woods because it apparently believes that the media reports it cites have created a public perception that Judge Woods cannot act impartially in this case. The practice of relying on newspaper and magazine articles as proof of substantive fact has no support in the rules of evidence. Moreover, as the panel's decision stands, this court will often be asked to act in response to the assumed perceptions created by columnists, writers, and journalists. Editorials, investigative journalism, and other popular writings certainly impact the public's perceptions and have their place in the judicial process. But these kinds of opinions, often biased and colored, cannot substitute for properly-tested evidence.

*C. The Standard for Disqualification Under Section 455(a)*

Upon its arrival at the merits of the Independent Counsel's request, the panel sets out to determine whether a "reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *Tucker*, No. 95-3268, slip op. at 11 (8th Cir. March 15, 1996) (citing *Gray v. University of Ark.*, 883 F.2d 1394, 1398 (8th Cir. 1989)). Although this accurately states the abstract standard required by section 455 (a), the panel's analysis fails to apply that standard in two significant respects: 1) it skews the reasonable person standard from one "who [knows] the circumstances" to one who has read or

heard certain allegations, and 2) it enunciates an unworkable, bright-line standard under which any twostep relationship between the presiding judge and a party constitutes an "unmistakable appearance of bias or partiality."

*1. The Reasonable Person Standard*

There is no question but that disqualification for the appearance of partiality is limited to those instances in which a reasonable person would have such doubts. In adopting the 1974 amendments to section 455, Congress cautioned:

> in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355. In its decision, the panel ignores the "who knows the circumstances" modifier of the reasonable person standard. Implicitly, the panel asserts that when faced with some information raising a reasonable question regarding a judge's impartiality, a party need not investigate further whether there are equally reasonable answers to those questions; instead,

the party may immediately seek that judge's disqualification. We cannot agree. The conclusions drawn by a reasonable person presented with only one side of a story will frequently be different than those made after careful consideration of all circumstances. *See, e.g., Little Rock Sch. Dist. v. Arkansas State Bd. of Educ.*, 902 F.2d 1289, 1292 (8th Cir. 1990) (holding that judge's responses to a reasonable neutral observer's questions regarding impartiality sufficient so as not to require disqualification).

The failure to consider all evidence, including potentially reasonable responses that could resolve or mitigate questions regarding impartiality, lacks common sense and fails to acknowledge that there are often simple and reasonable explanations to reasonable perceptions of partiality. *See. e.g., United States v. Darden*, 70 F. 3d 1507, 1536 (8th Cir. 1995) ("The morning the articles were published, the court explained its remarks to the defendants and the attorneys. This explanation revealed no bias against the defendants."). The most logical source of such counterevidence is the source of the perceived partiality: the judge. Because Judge Woods had no opportunity to address the Independent Counsel's concerns, the panel is unable to consider any of his potential answers. Instead, the panel places the burden of defending Judge Woods' impartiality with the party opposing the Independent Counsel, Jim Guy Tucker. See *Tucker*, No. 95-3268, slip op. at 10 (8th Cir. March 15, 1996). This is insufficient for the purposes of a section 455(a) inquiry and an insult to Judge Woods.

By explicitly providing for a party's waiver of any perceived judicial partiality, *see* 28 U.S.C. § 455(e), Congress clearly intended that such perceptions be aired before the presiding judge who might then allay any concerns held

by a party. With this legislative intent in mind, we believe that a standard that does not consider all of the circumstances, including any response provided by a district court judge, is incorrect. Moreover, it invites forum shopping as parties present evidence of impartiality to appellate courts regarding district court judges who are left without the ability to respond or dispel any allegations or perceptions. A more sensible approach would ask whether a reasonable person, knowing the basis for perceived partiality and any explanation or response to such perceptions, maintains questions regarding the impartiality of a judge. Unfortunately, the panel's lopsided inquiry will ensure frequent and improvident disqualifications in the future.

*2. The Two-Step Relationship*

Our second point of contention with the panel's analysis of the merits pertains to its conclusion of an unmistakable appearance of partiality. The proposition that a two-step relationship, such as a friend of a friend, creates the appearance of partiality must be rejected as overly broad, unpracticable, and inconsistent with our other decisions that limit the scope of perceived partiality to a reasonable standard. *E.g.*, *In re Apex Oil Co.*, 981 F.2d at 304-05 (denying a motion that judge recuse himself despite his tenuous involvement in litigation against the appellee).

A section 455 inquiry will always be fact-intensive, making it difficult to glean broad principles of application. The record in this case is so sparse, however, that it would be difficult not to deduce a bright-line rule requiring disqualification in instances where the judge has

a close relationship to someone who has a connection to a party. The record, as described by the panel,[6] indicates a relationship between Judge Woods and Hillary Clinton of such a nature that Judge Woods would be required to disqualify himself from presiding in a case in which either of the Clintons were a party. The record also indicates that there were some political associations between President Clinton, a former Democratic governor of Arkansas, and defendant Tucker, the current Democratic Governor of Arkansas. Taken on its face, the record does not reveal that the relationship was anything other than political. Nor does the record or the panel suggest that there is any other tie between Judge Woods and defendant Tucker. As such, we cannot help but conclude that this decision establishes a per se rule finding an "unmistakable appearance of partiality" where a party is an associate or friend of an individual who has close connections with the presiding judge. Moreover, given that section 455(b) requires a judge to disqualify herself where she or her spouse is related within the third degree to an individual who is either a party, an acting attorney, or has a substantial interest in the proceeding, it would be inconsistent not to apply the panel's bright-line rule to these individuals who are statutorily marked as creating impermissible questions of bias. Thus, under the standard developed by this panel, a friend or associate of a judge's granddaughter would raise questions of partiality requiring recusal. Clearly, this represents a departure from common sense.

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[6] Although we reject the evidence relied upon by the panel as a sound basis for its decision, for purposes of this argument we accept the allegations as fact.

Section 455 was never intended to disqualify judges from presiding over cases in which there might be a tenuous connection between the judge and a party. *See In re Apex Oil Co.*, 981 F.2d at 304-05; *United States v. Lovaglia*, 954 F.2d 811, 816 (2d Cir. 1992); (holding that past social relationship between judge and crime's victim did not create appearance of bias); *In re Allied Signal*, 891 F.2d 974, 976 (1st Cir. 1989) (holding that claim of partiality based on a series of social and business contacts between presiding judge and attorney years before was frivolous). Because the meager record supports a finding of only the most tenuous connection between Judge Woods and defendant Tucker, we maintain that this court has no choice but to reject the assertion of perceived partiality as a matter of law.

*Conclusion*

The basis for the decision to reassign this case is unique. This court has considered 28 U.S.C. § 455 over fifty times; the panel's decision today represents a marked departure from these decisions. *Reserve Mining Co. v. Lord*, 529 F. 2d 181 (8th Cir. 1976), illustrates the serious nature and circumstances that surround judicial reassignment. In *Reserve Mining*, we reassigned the action only after the district court judge openly disregarded a mandate of this court and took positions in the litigation more consistent with an advocate than a judge. *Id.* at 184-86.

If we are to consider the disqualification of any district court judge "in order to preserve the appearance of impartiality," we should do so on the basis of a clear record after the district judge has had an opportunity to re-

spond. With respect to the merits of the panel's decision, being a friend of a friend is not in itself a proper or adequate basis for disqualification. This court has never before based a decision on guilt by association, and now is not the time to start. If this principle is rejected, what becomes clear is that this case was not the result of established norms and procedures, but of special considerations and concerns. Given the highly political nature of this case and the necessity of the court to rule on the merits of the underlying litigation, the departure from common practice regarding the disqualification of a district court judge leaves this court open to the charge of politicization. The panel's decision, therefore, thwarts the very goal of section 455: promotion of public confidence in the impartiality of the judicial process. We have been authorized by Senior Judge Gerald W. Heaney to state that if he were permitted, he would vote to grant the petition for rehearing en banc with respect to the disqualification issue.[7]

May 6, 1996

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[7] We note that Independent Counsel's response to the suggestion for rehearing en banc chose not to address the subject of Judge Woods' disqualification.

[Dated September 5, 1995]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

v. NO. LR-CR-95-117

JIM GUY TUCKER, WILLIAM J. MARKS, SR., and JOHN H. HALEY

## MEMORANDUM OPINION

Separate defendant Jim Guy Tucker has moved to dismiss the indictment in this case on the ground that the Independent Counsel exceeded his jurisdiction. The Independent Counsel, by way of response, asserts: (1) that the indictment of the defendants in this case falls within the scope of his prosecutorial jurisdiction; and (2) that even if does not, the referral of the matter to him, as independent counsel, is not subject to judicial review.

### I. The Original Authorization for the Investigation of the Defendants.

The Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. §§ 591-599 (hereinafter the "Independent Counsel Act"), permits the Attorney General to request that independent counsel be appointed when preliminary investigation discloses that certain high officials in the Executive Department may have violated the law. 28 U.S.C. § 591(b). Other persons can come within the ambit of the Act if they cannot be investigated and prosecuted by an officer of the Department of Justice without

the appearance of a personal, financial, or political conflict of interest. 28 U.S.C. § 591(C)(2).

An independent counsel is appointed by a special three judge court of the United States Courts of Appeals for the District of Columbia, called the "Special Division." It is significant that the Special Division defines the independent counsel's prosecutorial jurisdiction. This is clear from the first sentence of 28 U.S.C. § 593(b)(3): "*In defining the independent counsel's prosecutorial jurisdiction*, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and *all matters related to that subject matter*." (Emphasis added.)

Congress reauthorized the original Ethics in Government Act on June 30, 1994, with a few changes. However, prior to the reenactment of the Independent Counsel Act, the Attorney General had conducted an investigation into a land development venture called "Whitewater" in which President Bill Clinton and Mrs. Hillary Rodham Clinton were investors, along with another partner, James McDougal. Because there was no independent counsel act in effect at the time, the Attorney General herself named Robert B. Fiske, Esquire, as independent counsel to further investigate the Whitewater venture.

After the reenactment of the Independent Counsel Act, the Special Division replaced Mr. Fiske with Kenneth Starr, Esquire, and authorized a continuation of the Whitewater investigation in the following terms:

> Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authori-

ty to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, NW, Washington, DC 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, *by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation*. (See Exhibit A.) (Emphasis added.)

Such was the jurisdictional authority defined by the Special Division, which had the sole statutory duty to define such jurisdiction.

In affixing this limitation on the jurisdictional grant, the Special Division was undoubtedly mindful of the *caveat* of the Supreme Court of the United States in *Morrison v. Olson*:

> [W]e do not think that Congress may give the Division unlimited discretion to determine the independent counsel's jurisdiction. In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case.

487 U.S. 654, 679 (1988) (Emphasis original).

What "gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case" was that the President was a "person" requiring appointment of an Independent Counsel. [28 U.S.C. § 591(b)(1).]

The subject matter of the indictment at issue here bears no relation whatsoever to the Clintons or James McDougal or their relationship with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. The following affidavit of Governor Tucker, dated July 7, 1995, and attached to his motion to dismiss the indictment on jurisdictional grounds has not been controverted:

Jim Guy Tucker, on oath, states as follows:

1. I am not and have never been a part of the Executive Branch of the United States Government.
2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.
3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS," Cablevision Management, Inc. ("CMI") or any other entity to which the indictment refers.

Further Affiant sayeth not. Is/ Jim Guy Tucker. (See Exhibit B.)

The Independent Counsel has come forward with no evidence to refute facts recited in the affidavit. Nor has he alleged a connection of any kind between Governor Tucker and President Clinton. This is not surprising. The Court takes judicial notice of the fact that President Clinton and Governor Tucker were political opponents during the years covered by this indictment. In 1982, Tucker opposed Clinton in the Democratic primary for Governor of the State of Arkansas. In 1990, when President Clinton made his last race for Governor of Arkansas, Tucker threatened to oppose him until virtually the last moment and then decided to run for Lieutenant Governor. The fact that these two men have been leaders of opposing factions in the Democratic party in Arkansas is well-known. That they would have been connected in any type of business venture in the period covered by the indictment would be highly unlikely, and Tucker's uncontroverted affidavit establishes this.

In fact, in his response to defendant's motions attacking jurisdiction, independent counsel conceded that there is no connection between the facts alleged in the indictment and the Clintons, McDougal and Capital Management Services, Inc. "Although the facts do not link Defendants to a specific relationship among CMS, the Clintons, or James B. McDougal, the Attorney General *reasonably* concluded that the LMS [Landowners Management System, subject of Count III of the indictment] matter was 'related to the independent counsel's prosecutorial jurisdiction' under Section 594(e) sufficiently to fall within that jurisdiction." (Response of the United States to Defendants' Motion to Dismiss Indictment for Lack of Jurisdiction, p.38.) How can it be said that the Attorney General reasonably concluded that there was a connection between the matter in the indictment and the Clintons and McDougal, if there was no actual connection? The position of the Independent Counsel is that whether the Attorney General's conclusion was reasonable or not, such conclusion is not subject to review by a district court, or by any court for that matter. This issue will be dealt with infra.

**II. The Grant of Supplemental Authorization.**

The Independent Counsel went back to the Attorney General with the request that the Attorney General seek authorization under 23 U.S.C. § 594(e) from the Special Division to investigate matters alleged in Count III of the indictment.' For some unknown reason, no request was ever made regarding the allegations contained in

Counts I and II of the indictment.[1] The Attorney General responded to the Independent Counsel by letter dated September 2, 1994:

> The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/ Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:
>
> > (1) Whether any person committed any federal crime relating to the bankruptcy action entitled In *Re: Landowners Management System. Inc., Tax Identification No 75-2001914, Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). . . (See Exhibit C.)

The Special Division issued an order of December 19, 1994, and this order provided in pertinent part as follows:

> Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is
>
> HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the Independent Counsel Kenneth W. Starr

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[1] Section 594(e) deals with referral o: "other matters" to an independent counsel.

and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594(e):

> Whether any person committed any federal crime relating to the bankruptcy action entitled In *Re: Landowners Management System, In., Tax Identification No 75-2001914. Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11) . . . (See Exhibit D.)

However, this order contained the following limitations after the grant of authority mentioned above:

> IT IS FURTHER ORDERED that, as a result of the referral of the above-described matters and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Authorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.
>
> The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation. . . (See Exhibit D.)

Obviously, from the Special Division's own order, the supplemental investigation was required to be "connected with or arising out of that investigation." "That investigation" is the investigation of the Clintons and McDougal mentioned in the preceding paragraphs.

In placing such a limitation on the jurisdiction of the independent counsel, the Special Division may well have had in mind the Supreme Court's interpretation of 28 U.S.C. § 594(e) in *Morrison v. Olson*.:

> In our view, this provision does not empower the court to expand the original scope of the counsel's jurisdiction; that may be done only upon request of the Attorney General pursuant to § 593(c)(2). At most, § 594(e) *authorizes the court simply to refer matters that are "relate[d] to the independent counsel's prosecutorial jurisdiction," as already defined.*

487 U.S. 654, 680, n.18 (1988) (Emphasis added).

## III. The Power to Review the Attorney General's Referral of the Matters Contained in Count III to the Independent Counsel.

It is obvious that the matters contained in Count III of the indictment, which the Attorney General has referred to the Independent Counsel, are completely unrelated to the Clintons and McDougall even though 28 U.S.C. § 594(e) under which the referral was made requires that the Attorney General "refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction," the Attorney General and Independent Counsel argue that the referral is not reviewable. It is not reviewable wrong and without support in the statute or in the order of the Special Division.

I cannot accept the proposition that a citizen can be put on trial in my court for a loss of his liberty and that no court has the power to determine whether there is jurisdiction to proceed in the matter.

The Attorney General argues on page 18 of her brief: "Under the terms of Section 594(e), the process does not even require the involvement of the Special Division." While the wording of 28 U.S.C. § 594(e) may be susceptible to such an interpretation, the Supreme Court has indicated that referrals under this section are a part of the powers and duties of the Special Division:

> The Act also vests in the Special Division various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining his or her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority. These duties include . . . referring matters to the counsel upon request, § 594(e). . . .

*Morrison v. Olson*, 487 U.S. 654, 680.

But even assuming that the Independent Counsel is correct and that it is not necessary for the Attorney General to seek approval of the Special Division before referring matters to the Independent Counsel, the Attorney General faces the same jurisdictional obstacles as the Special Division. 28 U.S.C. § 594(e) requires referral only as to "matters related to the independent counsel's prosecutorial jurisdiction."

Significantly, the Attorney General, through Mr. Keeney, the Acting Assistant Attorney General, made the following statement in the letter of September 2, 1994, to Mr. Starr, in regard to the bankruptcy matter:

> To the extent you determine that aspects of these matters which might fall technically within the broad

> scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. § 597(a).

Thus, we have clear recognition by the Attorney General that the matters in the indictment must be "sufficiently related to your mandate." Not only were the matters contained in the indictment insufficiently related to the mandate, they were not related at all. In the matter at bar, the Attorney General did not attempt to proceed without the involvement of the Special Division. Even so, there are limits on the scope of prosecutorial jurisdiction which the Special Division can confer:

> We emphasize, nevertheless, that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications. . . . [T]he Division's exercise of unauthorized powers risks the transgression of the constitutional limitations of Article III that we have just discussed.

*Morrison v. Olson*, 487 U.S. 654, 684-685 (Emphasis original). In a footnote to the last sentence, the Court stated: "After all, in order to decide whether to refer a matter to the counsel, the court must be able to determine whether the matter falls within the scope of the original grant. See n. 18, supra." 487 U.S. at 685 n. 18. (Footnote 18 is quoted in its entirety, supra.) Surely the Independent Counsel and Attorney General do not suggest that there can be no judicial review of prosecutorial jurisdiction of an independent counsel. If this were so, the Special Divi-

sion would be virtually the only court in American jurisprudence, save the Supreme Court of the United States, whose decisions are subject to no judicial review whatsoever, regardless of whether those decisions are patently contrary to law. Such a precedent would be both novel and dangerous.

The Independent Counsel finds a nexus to the Clintons and McDougal to satisfy the above requirements in the fact that, while investigating their relationship to Capital Management Services, Inc., counsel fortuitously stumbled across the defendants' alleged violation of the law. (See Response of United States to Defendants' Motions to Dismiss Indictment for Lack of Jurisdiction. p.36.) In support, the Independent Counsel quotes from *United States v. Secord*,: "To determine that one occurrence is 'related' to another, one need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between events." 725 F. Supp. 563, 566 (D.D.C. 1989). The relation between the indictment herein and McDougal or the Clintons falls far short of this test.

The facts demonstrating the alleged relationship are stated by the Independent Counsel as follows: "Information that Defendant Tucker may have asserted a claim as a creditor in a fraudulent bankruptcy filed by Landowners Management Systems, Inc., was first provided to Independent Counsel Fiske by a witness in the investigation of Capital Management Services, Inc. Additional investigation determined that an allegedly fraudulent loan from Capital Management Services was used as collateral to finance the purchase of cable television interests. . . ." (See Response of United States, supra, p. 37.)

This argument is without merit because the "original jurisdiction order" only deals with Capital Management Services, Inc. in the following context: ". . . whether any individuals or entities have committed a violation of federal criminal law . . . relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." (See Exhibit A, order of Special Division, dated August 5, 1994.)

The original grant thus was only in reference to the Clintons' and McDougal's relationship to Capital Management Services, Inc., not to anyone else's relation to this entity. For another individual or entity to be related, such individual or entity would necessarily have to be involved in the Clintons' or McDougal's relationship to Capital Management Services, Inc.

The Independent Counsel goes on to say: "These facts show that the matters under indictment are related to the subject matter of the Independent Counsel's investigation." These facts show nothing of the kind, which Independent Counsel concedes in the next sentence: "Although the facts do not link Defendants to a specific relationship among CMS, the Clintons or James B. McDougall . . ."

In a footnote on page 38 of his brief on jurisdiction, the Independent Counsel argues that there is a relation in the fact that Capital Management Services, Inc. is one of the entities listed in the grant of original jurisdiction and the Count III allegations were discovered during the investigation of this entity. As stated above, the record is devoid of evidence of any relationship or connection be-

tween the Clintons and McDougal and any of the matters alleged in the indictment.

Admittedly, certain actions of the Attorney General are not subject to review. The decision to refer or not to refer a matter to the Independent Counsel is not subject to review. Whether to investigate a person and whether to require appointment of an independent counsel is not subject to review. The cases cited on this issue are not on point and are thus not persuasive. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986) involved a suit by a member of Congress and two private citizens over the Attorney General's failure to conduct a preliminary investigation of a particular allegation. The Ninth Circuit held that, "failure to discharge these duties is not subject to federal court challenge by private citizens." In *Banzhaf v. Smith*, 737 F.2d 1167, 1170 (D.C. Cir. 1984), the question was whether refusal to conduct a preliminary investigation is reviewable.

All of these situations are a far cry from the question of whether the trial court has jurisdiction—whether the Attorney General and the Special Division completely exceeded their authority in referring a non-related matter to the Independent Counsel. In at least one instance, the action of the Attorney General in referring a matter to the independent counsel was reviewed by the Special Division. The Special Division found that the matter had been improperly referred by the Attorney General because of lack of prosecutorial jurisdiction. See, *In Re: Meese*, 907 F.2d 1192, 1199-1201 (D.C. Cir. 1990). The Meese Opinion includes a quote from the Application to Define Jurisdiction of Independent Counsel made by James C. McKay, independent counsel in that case:

> It does not appear [under the Act], however, that the Acting Attorney General has the power to define the prosecutorial jurisdiction of an independent counsel, See 28 U.S.C. § 593(c). That power is vested only in this court, which has not formalized a definition of Independent Counsel McKay's prosecutorial jurisdiction in the Meese matter.
>
> Application to Define Jurisdiction of Independent Counsel, *In re Nofziger/Meese*, Div. No. 87-1 (Aug. 6, 1987). . . .

*Meese*, 907 F.2d at 1200-01 (Emphasis original). This comports with the plain meaning of the statute, as examined and noted earlier in this opinion.

**IV. Conclusion.**

The Independent Counsel, in his brief at page 29, asks: What is the harm if the Independent Counsel handles this investigation rather than the Attorney General? What difference does it make? It makes a great deal of difference if the statute and the Supreme Court plainly state that only matters related to the Independent Counsel's original prosecutorial jurisdiction are to be handled by him. In the first place, criminal statutes and criminal procedures must be faithfully followed. To gloss over and shortcut the requirements of criminal statutes is the first step toward tyranny. If the statute says that the Independent Counsel should not make the decision to prosecute in an unrelated matter, but that this decision shall be made by the Attorney General, it makes a great deal of difference.

Few would disagree with Justice Scalia's statement in his dissent in *Morrison v. Olson*, *supra*, at 708 that: ". . . the balancing of various legal, practical and political con-

sideration, none of which is absolute, is the very essence of prosecutorial discretion." The vast power and immense discretion the Independent Counsel seeks to wield in this case must find its genesis in the statute or in the courts' interpretation of the statute. I do not find it here.

The words of Justice Robert Jackson, in an address, *The Federal Prosecutor*, delivered at the Second Annual Conference of United States Attorneys April 1, 1940, were quoted by Justice Scalia in his dissent in *Morrison v. Olson*, *supra*, at 728. These words bear repeating here:

> What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong

> political views, or being personally obnoxious to or in the way of the prosecutor himself. . .

It is certainly true that the United States Attorney or the Attorney General may find in their discretion that these defendants have violated the law and that they should be indicted and prosecuted. However, such discretion is theirs to exercise. It is not granted to an independent counsel under the statutes or decisions of our courts in this particular matter.

While the Supreme Court has upheld the constitutionality of the Ethics in Government Act, *Morrison v. Olson*, *supra*, cannot be read without drawing the conclusion that the Supreme Court meant that the authority and jurisdiction of an independent counsel should be confined to a narrow channel and not be expanded beyond the explicit wording of the statute. A thoughtful commentator has pointed out that:

> . . . congressional committee requests for independent counsel investigations of *particular named* executive officials bear a frightening resemblance to Bills of Attainder. Bills of Attainder, however, traditionally required at least the approval of the entire legislature (like all other "legislation"). In contrast, independent counsel requests may be triggered by just a few members of Congress serving on a particular committee with an axe to grind. See 28 U.S.C. § 592(g)(1) (1988). Once a partisan request for the appointment of an independent counsel has been made, the Attorney General and the Special Division which oversees such investigations may find it very difficult to avoid appointing a counsel just to clear up the "impressions" that were created by the request having been made. And once a counsel is appointed, the pressures to prosecute or to force a plea bargain (as happened with Michael Deaver and Webster Hubbell) are not

> insignificant. Accordingly, the EIGA independent counsel system is not as far removed from the traditionally hated and unconstitutional Bill of Attainder as many may think.

S.G. Calabresi, "Some Normative Arguments for the Unitary Executive," 48 Ark.L.Rev., p.93, n. 164. (This statement is attributed to Walter Dellinger, III.)

Since its original enactment, the Independent Counsel Act has been used extensively, some would say, including Justice Scalia, that it has been abused. The *Arkansas Law Review* article, cited supra, at n.163, points out its wide use:

> During the two years of the Carter Administration that the Ethics in Government Act was in effect, two Independent Counsels were appointed: Arthur Christy investigated White House Chief of Staff Hamilton Jordan and Gerald Gallinghouse investigated White House staffer Timothy Kraft. During the eight years of the Reagan Administration, seven Independent Counsels were appointed: Leon Silverman investigated Secretary of Labor Raymond Donovan; Jacob Stein investigated White House Counselor Edwin Meese III; Alexia Morrison investigated Assistant Attorney General Theodore Olson; Whitney North Seymour investigated White House aide Michael Deaver; Laurence Walsh investigated a number of officials for their involvement in Iran-Contra; James McKay investigated Lynn Nofziger, Attorney General Edwin Meese III, and others; and former Judge Arlin Adams investigated HUD Secretary Samuel Pierce, Jr. During the three years and 11 months of the Bush Administration that the statute was in effect, one additional Independent Counsel was appointed: Joseph DeGenova investigated Secretary of State James Baker and other State Department aides involved in the illegal search of Bill Clinton's passport

file. Independent Counsels Laurence Walsh and Arlin Adams continued their investigations throughout this period. During the first two months of the Clinton Administration that the statute has been back in effect, Attorney General Janet Reno has sought the appointment of two Independent Counsel: the first request concerned the Whitewater Investigation and led to the appointment of Kenneth Starr to replace Robert Fiske; the second request concerned Agriculture Secretary Mike Espy and led to the appointment of Donald Smaltz.

During the Clinton Administration, citizens of the State of Arkansas have undergone wide-ranging investigations by two independent counsel. Some of these, on the surface at least, would seem to have dubious connection with the original or supplemental grant of prosecutorial jurisdiction.

The history of independent counsel investigations is not reassuring to this Court. Perhaps the most questionable example was the indictment of Defense Secretary Weinberger in the Iran-Contra investigation by an independent counsel. Weinberger was one of two cabinet officials who opposed the Reagan Administration's involvement in the Iran-Contra affair. Yet, he was the only cabinet official who suffered an indictment.

While Justice Scalia's dissent did not carry the day in *Morrison v. Olson*, *supra*, he made some highly pertinent observations about the officials having supervision over the independent counsel. He or she is responsible to no elected officials, but only to a panel of three appointed members of the Federal Judiciary.

As Justice Scalia points out the highly successful Teapot Dome and Watergate investigations were carried out by independent counsel named by the Attorney General.

Elected members of the Executive Department were ultimately responsible to the electorate for the manner in which these investigations were carried out. Not so with the independent counsel under the current statute. "It seems to me not conducive to fairness. But even if it were entirely evident that unfairness was in fact the result—the judges hostile to the administration, the independent counsel an old foe of the President, the staff refugees from the recently defeated administration—*there would be no one accountable to the public to whom the blame could be assigned.*" (*Morrison v. Olson*, *supra*, at 731, Scalia, J., dissenting) (Emphasis original.)

I am not suggesting that there has been unfairness in the case at bar on the part of the Independent Counsel or the Special Division. I do believe, as does Justice Scalia, that the potential is present in the Independent Counsel Act. I have no idea what the proof will be on this indictment. I am firmly convinced, along with the majority in *Morrison v. Olson*, *supra*, that the prosecutorial jurisdiction of the Independent Counsel must be strictly contained within its statutory bounds.

There are, undoubtedly, situations that may justifiably call for the appointment of independent counsel. At any rate, Congress has made such a determination. The wisdom of this statute is not for me to decide. This does not mean that the judiciary is not the proper department of our government to delineate the bounds of the statute's prosecutorial jurisdiction. I am at least empowered initially to make this determination. If we are to remain a

government of laws and not of men, it must ever be so.[2]

It is evident from this opinion that I am convinced that the Independent Counsel had no jurisdiction to present the matters contained in this indictment to the grand jury. In my view, this jurisdiction was vested in the Attorney General or the United States Attorney for the Eastern District of Arkansas. It was within their sole jurisdiction to exercise their discretion as to whether the indictment should be obtained in this matter.

It, therefore, follows that this indictment must be quashed as to all defendants. Parenthetically, I add that I deal with an important issue in this case. Fortunately, all my decisions are subject to higher review.

I will do everything in my power to have an expeditious appeal of this decision to the Court of Appeals and to the Supreme Court. In this endeavor, I can pledge the support of my clerk and court reporter. The defendants have stated that they seek a quick disposition of this matter. I am sure the government joins in these sentiments. I can assure all concerned that I am also anxious for a quick resolution.

It would be foolish to put these parties to an extensive and expensive trial when there exists a serious, and in my view, fatal defect of jurisdiction. Lack of jurisdiction can be successfully raised at any point in litigation. How patently unfair would it be after the stress and expense of a long trial to have a determination made at a later

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[2] I had never realized until reading Justice Scalia's opinion in *Morrison v. Olson*, *supra*, that the origin of this principle is to be found in the Massachusetts Constitution of 1780. [487 U.S. at 697.]

stage of the proceedings that there was no jurisdiction in the first place?

An order will be entered in conformity with this opinion quashing this indictment in its entirety as to the three defendants. All other motions except those relating to jurisdiction are rendered moot.

DATED this 5th day of September, 1995.

[Dated _____]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

| | |
|---|---|
| In re: Madison Guaranty Savings & Loan Association | Division No. 94-1<br><br>Order Appointing Independent Counsel |

Before: SENTELLE, *Presiding*, and BUTZNER and SNEED, *Senior Circuit Judges*.

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether any individuals or entities have committed a violation of federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Kenneth W. Starr, Esquire, of the District of Columbia bar, with offices at Kirkland and Ellis, 655-15th Street, Nw, Washington, DC, 20005, be and he is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent

authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses. The Court, having reviewed the motion of the Attorney General that Robert B. Fiske, Jr., be appointed as Independent Counsel, has determined that this would not be consistent with the purposes of the Act. This reflects no conclusion on the part of the Court that Fiske lacks either the actual independence or any other attribute necessary to the conclusion of the investigation. Rather, the Court reaches this conclusion because the Act contemplates an apparent as well as an actual independence on the part of the Counsel. As the Senate Report accompanying the 1982 enactments reflected, "[t]he intent of the special prosecutor provisions is not to impugn the integrity of the Attorney General or the Department of Justice. Throughout our system of justice, safeguards exist against actual or perceived conflicts of interest without reflecting adversely on the parties who are subject to conflicts." S. Rep. No. 496, 97th "Cong., 2d Sess. at 6 (1982) (emphasis added). Just so here. It is not our intent to impugn the integrity of the Attorney General's appointee, but rather to reflect the intent of the Act that the actor be protected against perceptions of conflict. As Fiske was appointed by the in-

cumbent administration, the Court therefore deems it in the best interest of the appearance of independence contemplated by the Act that a person not affiliated with the incumbent administration be appointed.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the beet interests of Justice for the identity and prosecutorial Jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam
For the Court:

Ron Garvin, Clerk

STATE OF ARKANSAS )
) SS
COUNTY OF PULASKI )

AFFIDAVIT OF JIM GUY TUCKER

Jim Guy Tucker, on oath, states as follows:

1. I am not and have never been a part of the Executive Branch of the United States Government.

2. I have examined the indictment in this case. To my certain knowledge no member of the Executive Branch of the United States Government participated in any transaction to which the indictment refers.

3. To my certain knowledge neither the President of the United States nor his First Lady have had any connection whatever with the business matter called, in the indictment, "LMS", Cablevision Management, Inc. (~) or any other entity to which the indictment refers.

Further Affiant sayeth not.

_____
Jim Guy Tucker

SUBSCRIBED AND SWORN to me before this the 7th day of July, 1995.

_____
Notary Public

GOVERNMENT
EXHIBIT
2

Office of the Assistant Attorney General

September 2, 1994

Mr. Kenneth W. Starr
Two Financial Centre
10825 Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211

Dear Mr. Starr:

The Attorney General has received your letter of August 31, 1994 requesting that the Department of Justice refer to the Office of Independent Counsel/Madison Guaranty Bank related matters pursuant to 28 U.S.C. § 594(e). After reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your Office would be appropriate. We therefore refer investigative and prosecutorial jurisdiction over the following matters to your Office:

(1) Whether any person committed any federal crime relating to the bankruptcy action entitled *In Re: Landowners Management System, Inc., Tax Identification No. 75-2001914. Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11); and

REDACT

REDACT

REDACT

Your jurisdiction affords you necessary flexibility in structuring your investigation. To the extent you determine that aspects of these matters which might fall technically within the broad scope of your jurisdiction are not sufficiently related to your mandate to warrant handling by your office, you may refer those aspects back to the Department of Justice for handling pursuant to 28 U.S.C. § 597(a).

Should you wish at any time to consult with the Department of Justice concerning Departmental policies with respect to these criminal tax or other matters, 28 U.S.C. § 594(f)(1), I invite you to contact Lee J. Radek, Chief, or Jo Ann Farrington, Deputy Chief, Public Integrity Section, Criminal Division, who will put you in touch with the appropriate Departmental officials. They can be reached at (202) 514-1412.

To complete our files, I would appreciate your providing Mr. Radek with a copy of your notification to the Special Division of the Court of this referral. 28 U.S.C. § 594(e). Please let me know if I can be of any further assistance to you in the course of your investigation.

Sincerely,

John C. Keeney
Acting Assistant Attorney General
Criminal Division

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division of the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

| | | |
|---|---|---|
| In re: | Madison Guaranty Savings & Loan Association | Division 94-1<br><br>UNDER SEAL |

ORDER

Upon consideration of the Application for Order of Referral and Order of Jurisdiction of Independent Counsel filed under seal, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matter be referred to the Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. § 594 (e):

REDACT

REDACT

REDACT

REDACT

REDACT

REDACT

Whether any person committed any federal crime relating to the bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor*, United States Bankruptcy

Court, Northern District of Texas; Case No. 787-70392 (Chapter 11);

REDACT

IT IS FURTHER ORDERED, that, as a result of the referral of the above-described matter, and the jurisdictional grant made by this Court on August 5, 1994, Kenneth W. Starr has full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether any individuals or entities have committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc.

The Independent Counsel further has jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any person or entity developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation, including, but not limited to:

REDACT

Whether any person committed any federal crime refacing to the bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax Identification No. 75-2001914, Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11);

REDACT

The Independent Counsel has jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matter described above.

The Independent Counsel has jurisdiction and authority to seek indictment and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel has all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

The Independent Counsel, as authorized by 28 U.S.C. § 594, has prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crime. (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, and intimidation of witnesses.

IT IS FURTHER ORDERED that the Independent Counsel may disclose, to those persons who are the subject of the matters referred to the Independent Counsel and their counsel, those portions of this Order relating to such subjects provided that:

(1) A person to whom disclosure is permitted to be made shall receive a copy of this order from which all matters will be redacted from pages 1 through 4 except those pertaining to the person to whom disclosure is made; and

(2) Each recipient of the redacted Order shall sign a Statement of Acknowledgement and Consent in the form attached hereto.

IT IS SO ORDERED.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States provides in part:

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### ARTICLE II

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SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and

if there be more than one who have such majority, and have an equal Number of Votes, then the House of Representatives shall immediately Chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner Chuse the President. But in Chusing the President, the Votes shall be taken by States, the Representation from each State having one vote; A quorum for this Purpose shall consist of a Member of Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall Chuse form them by Ballot the Vice President.

The Congress may determine the Time of Chusing Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to that Office who shall not have attained to the Age of thirty five years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President,

and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, received for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will the best of my Ability, preserve, protect, and defend the Constitution of the United States."

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SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are

not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

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The United States Code Annotated provides in part:

**§ 144. Bias or prejudice of judge**

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which to proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

**§ 371. Conspiracy to commit offense or to defraud the United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

**§ 455. Disqualification of justice, judge, or magistrate**

(a) Any justice, judge, or magistrate, of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or

expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree or relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

**§ 591. Applicability of provisions of this chapter**

(a) **Preliminary investigation with respect to certain covered persons.**—The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(b) **Persons to whom subsection (a) applies.**—The persons referred to in subsection (a) are

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of Title 5;

(3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of Title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5314 of Title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) the chairman and treasurer of the principal campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President;

(7) any individual who held an office or position described in paragraph (1), (2), (3), (4), or (5) for 1 year after leaving the office or position; and

(8) any individual who leaves any office or position described in any of paragraphs (1) through (5) of this subsection, during the incumbency of the President under whom such individual served in the office or position plus one year after such incumbency, but in no event longer than a period of three years after the individual leaves the office or position.

(c) **Preliminary investigation with respect to other persons.—**

(1) **In general.**—When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal,

financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(2) **Members of Congress.**—When the Attorney General determines that it would be in the public interest, the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(d) **Examination of information to determine need for preliminary investigation.—**

(1) **Factors to be considered.**—In determining under subsection (a) or (c) (or section 592(c)(2)) whether grounds to investigate exist, the Attorney General shall consider only—

(A) the specificity of the information received; and

(B) the credibility of the source of the information.

(2) **Time period for making determination.**—The Attorney General shall determine whether grounds to investigate exist not later than 30 days after the information is first received. If within that 30-day period the Attorney General determines that the information is not

specific or is not from a credible source, then the Attorney General shall close the matter. If within that 30-day period the Attorney General determines that the information is specific and from a credible source, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 30-day period, whether the information is specific and from a credible source, the Attorney General shall, at the end of that 30-day period, commence a preliminary investigation with respect to that information.

(e) **Recusal of Attorney General.—**

(1) **When recusal is required.**—(A) If information received under this chapter involves the Attorney General, the next most senior official in the Department of Justice who is not also recused shall perform the duties assigned under this chapter to the Attorney General.

(B) If information received under this chapter involves a person with whom the Attorney General has a personal or financial relationship, the Attorney General shall recuse himself or herself by designating the next most senior official in the Department of Justice who is not also recused to perform the duties assigned under this chapter to the Attorney General.

(2) **Requirements for recusal determination.**—Before personally making any other determination under this chapter with respect to information received under this chapter, the Attorney General shall determine under paragraph (1)(B) whether recusal is necessary. The Attorney General shall set forth this determination in writing, identify the facts considered by the Attorney

General, and set forth the reasons for the recusal. The Attorney General shall file this determination with any notification or application submitted to the division of the court under this chapter with respect to such information.

### § 592. Preliminary investigation and application for appointment of an independent counsel

(a) **Conduct of preliminary investigation.—**

(1) **In general.**—A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

(2) **Limited authority of Attorney General.**—(A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with

respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are not reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) **Extension of time for preliminary investigation.**—The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) **Determination that further investigation not warranted.**—

(1) **Notification of division of the court.**—If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) **Form of notification.**—Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) **Determination that further investigation is warranted.**—

(1) **Application for appointment of independent counsel.**—The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

(2) **Receipt of additional information.**—If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall—

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

(d) **Contents of application.**—Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

(e) **Disclosure of information.**—Except as otherwise provided in this chapter or as deemed necessary for law enforcement purposes, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

(f) **Limitation on judicial review.**—The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

(g) **Congressional request.**—

(1) **By Judiciary Committee or members thereof.**—The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

(2) **Report by Attorney General pursuant to request.**—Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

(3) **Submission of information in response to congressional request.**—At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

(4) **Disclosure of information.**—Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions ~~of~~ such report, notification, application, document, material, or memorandum as will not in the committee's judgment prejudice the rights of any individual.

**§ 593. Duties of the division of the court**

(a) **Reference to division of the court.**—The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) **Appointment and jurisdiction of independent counsel.**—

(1) **Authority.**—Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) **Qualifications of independent counsel.**—The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) **Scope of prosecutorial jurisdiction.**—In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that my arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) **Disclosure of identity and prosecutorial jurisdiction.**—An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

(c) **Expansion of jurisdiction.**—

(1) **In general.**—The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

(2) **Procedure for request by independent counsel.—**

(A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel with respect to the matters involved.

(C) If—

(i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted, the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters

involved or shall appoint another independent counsel to investigate such matters.

(d) **Return for further explanation.**—Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return the matter to the Attorney General for further explanation of the reasons for such determination.

(e) **Vacancies.**—If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

(f) **Attorneys' fees.**—

(1) **Award of fees.**—Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection.

(2) **Evaluation of fees.**—The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing—

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item;

(C) whether the underlying item would have been incurred but for the requirements of this chapter; and

(D) the reasonableness of the amount of money requested.

(g) **Disclosure of information.**—The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.

(h) **Amicus Curiae briefs.**—When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

**§ 594. Authority and duties of an independent counsel**

(e) **Referral of other matters to an independent counsel.**—An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel

may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel shall notify the division of the court.

**§ 596. Removal of an independent counsel; termination of office**

(a) **Removal; report on removal.—**

(1) **Grounds for removal.**—An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

**§ 2106. Determination**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(2) (2) (2)

Nos. 95-2008, 95-2013 and 95-2070

# In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

WILLIAM J. MARKS, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

JIM GUY TUCKER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

JOHN HALEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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30 pp

## QUESTIONS PRESENTED

1. Whether, under the facts and circumstances of the investigation by the independent counsel, the Attorney General of the United States properly referred a particular "related matter" to the independent counsel for investigation and prosecution.

2. Whether, under the specific circumstances of this case, the court of appeals correctly concluded that the appearance of judicial bias or partiality warranted reassignment, pursuant to 28 U.S.C. § 2106, to a different district judge.

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# In the Supreme Court of the United States

OCTOBER TERM, 1996

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No. 95-2008

WILLIAM J. MARKS, SR., PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Tucker Pet. App. 1-28) is reported at 78 F.3d 1313. The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc*, along with the opinion of two dissenting judges (Tucker Pet. App. 29-46), is published at 82 F.3d 1423. The opinion of the district court (Tucker Pet. App. 47-68) is reported at 898 F. Supp. 654.

## JURISDICTION

The judgment of the court of appeals was entered on March 15, 1996. Petitions for rehearing and suggestions for rehearing *en banc* were denied on May 6, 1996. The petitions for a writ of certiorari were filed on June 13, 14, and 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Title 28, United States Code, Section 594(e) provides:

> An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel

> accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

Title 28, United States Code, Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Other relevant portions of the Ethics in Government Act, 28 U.S.C. §§ 591-599, are set forth at Tucker Pet. App. 87-101.

## STATEMENT

1. On July 1, 1994—one day after enactment of the Independent Counsel Reauthorization Act of 1994—the Attorney General of the United States, acting pursuant to 28 U.S.C. § 592(c), applied to the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels ("Special Division") for the appointment of an independent counsel. (Marks Pet. App. 86-92). On August 5, 1994, the Special Division appointed the undersigned to that position. (Tucker Pet. App. 69-72).

The Attorney General's application recounted that in October 1993, the Resolution Trust Corporation (RTC) referred a number of allegations to the United States Attorney for the Eastern District of Arkansas concerning an Arkansas financial institu-

tion known as Madison Guaranty Savings & Loan and one of its principal owners, James B. McDougal. (Marks. Pet. App. 86). The application noted that McDougal had been a partner with President William Jefferson Clinton and First Lady Hillary Rodham Clinton in an Arkansas real estate venture known as Whitewater Development Corporation. (*Id.*). The Attorney General further explained that during that same time period, the United States Attorney was prosecuting David L. Hale, a Little Rock municipal judge, for fraud against the Small Business Administration. (*Id.* at 86-87). The fraud related to Capital Management Services, Inc., a federally-licensed small business investment company owned by Hale. (*Id.* at 87).

The Attorney General explained that while plea negotiations were underway between Hale and the United States Attorney in Little Rock, Hale made a number of allegations against former associates, including James McDougal, President Clinton, and Hillary Rodham Clinton, concerning the misuse of funds of Capital Management Services. (*Id.*). The Attorney General requested appointment of an independent counsel because investigation by the Department of Justice of the matters described in her application "would present a political conflict of interest." (*Id.* at 89).[1]

In accordance with 28 U.S.C. § 593(b)(3), the Special Division appointed the independent counsel

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[1] The Ethics in Government Act permits the Attorney General to seek appointment of an independent counsel to investigate and prosecute persons who are not officials of the Executive Branch if she determines that investigation or prosecution by the Justice Department "may result in a personal, financial, or political conflict of interest." 28 U.S.C. § 591(c)(1).

and defined his jurisdiction. The Special Division's order of August 5, 1994, provided:

> [The independent counsel] is hereby appointed . . . with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the [Act] *whether any individuals or entities* have committed a violation of any federal criminal law . . . *relating in any way* to James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. (Tucker Pet. App. 69) (emphasis added).

In addition, the order granted the independent counsel jurisdiction to investigate and prosecute "other allegations or evidence of violation of *any federal criminal law . . . by any person* or entity *developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.*" (emphasis added) (*Id.* at 70). The order also conferred "prosecutorial jurisdiction to fully investigate and prosecute the subject matter . . . as hereinbefore set forth, and *all matters and individuals whose acts may be related to that subject matter . . . .*" (*Id.* at 71) (emphasis added).

Shortly after the appointment, on August 31, 1994, the newly constituted Office of the Independent Counsel ("OIC") requested, pursuant to 28 U.S.C. § 594(e), that the Attorney General refer to the OIC a particular "related" matter—the investigation and possible prosecution of any violations of federal criminal law relating to a bankruptcy action entitled *In re: Landowners Management Systems, Inc., Tax*

*Identification No. 75-2001914, Debtor*, United States Bankruptcy Court, Northern District of Texas, Case No. 787-70392 (Chapter 11). By letter dated September 2, 1994, the Attorney General referred that matter. Acting Assistant Attorney General Keeney, speaking for the Attorney General, informed the OIC of the Attorney General's conclusion that the Landowners Management Systems bankruptcy matter is "related to your investigation." (Tucker Pet. App. 74). Based upon this specific prosecutorial judgment, Mr. Keeney stated that "[w]e therefore refer investigative and prosecutorial jurisdiction" to the OIC. (*Id.* at 75).[2]

2. The Attorney General referred the Landowners Management Systems bankruptcy matter to the OIC in the context of an ongoing criminal investigation that had begun in 1993. The Special Division's appointment of an independent counsel marked the third change in the prosecutorial authority vested with responsibility for investigating the matters then assigned to the OIC. As noted, the prosecution of David Hale was initiated by the United States Attorney's Office in Little Rock, and the RTC made criminal referrals to that same office in 1993. On November 5, 1993, however, after the publication of national news stories about Hale's allegations and the RTC's investigation of Madison Guaranty, the United States Attorney recused herself and her staff from

[2] On September 12, 1994, in accordance with Section 594(e) of the Act, the OIC notified the Special Division of the Attorney General's referral. On December 16, 1994, in an abundance of caution, the independent counsel applied to the Special Division for an Order of Referral regarding the Landowners Management Systems bankruptcy action. On December 19, 1994, the Special Division also referred the matter to the OIC. (Tucker Pet. App. 76-79).

further investigation and prosecution of matters pertaining to Capital Management Services and Madison Guaranty.

As a result, a team of trial lawyers from the Fraud Section of the Criminal Division was assigned to undertake the prosecution of Hale and the investigation into matters concerning Capital Management Services, Madison Guaranty, and Whitewater Development. The Fraud Section continued its investigation through early 1994.

On January 20, 1994, after a request by President Clinton, the Attorney General announced the appointment of Robert B. Fiske, Jr., as an independent counsel pursuant to Justice Department regulations. *See* 28 C.F.R. § 600.1.[3] Mr. Fiske's regulatory jurisdiction included authority to investigate "whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services." 28 C.F.R. § 603.1(a). The regulation went on to grant Mr. Fiske "jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation." *Id.* § 603.1(b). Mr. Fiske thus assumed responsibility for all aspects of the ongoing investiga-

[3] At the time, the portions of the Ethics in Government Act that provided for a court-appointed independent counsel were not in effect. *See* 28 U.S.C. §§ 591-599.

tion, including the prosecution of David Hale and his codefendants.

On March 22, 1994, Hale pleaded guilty to a two-count information. Hale's plea agreement, requiring his cooperation with Mr. Fiske's office, was filed in open court. Thereafter, during interviews of David Hale, Mr. Fiske's office learned of allegations of fraudulent activity relating to petitioner Tucker and his cable company interests.

Mr. Fiske's office then investigated whether petitioner Tucker and others had committed any violation of federal law, including tax offenses, with respect to a claim Tucker asserted as a secured creditor in the Landowners Management Systems bankruptcy action. Tr. 29-30. As of the date of the Special Division's appointment of an independent counsel under the reauthorized statute, Mr. Fiske's office was actively investigating whether the use of a fraudulent bankruptcy proceeding to obtain tax benefits would justify a prosecution for federal tax violations.

In her July 1994 application for appointment of an independent counsel, the Attorney General requested that the Court grant the statutory independent counsel "the same prosecutorial jurisdiction as that granted to regulatory Independent Counsel Fiske, so that the investigation may continue without interruption." (Marks Pet. App. 90) (emphasis added). The Special Division granted the Attorney General's request and defined the independent counsel's jurisdiction in criminal matters at least as broadly as the jurisdiction granted to Mr. Fiske. (Tucker Pet. App. 69-72). Accordingly, the new independent counsel from the outset—without interruption—continued the investigation of matters under examination by Mr. Fiske's office, including the Landowners Management Systems bankruptcy.

3. The investigation by the newly constituted OIC, building upon the work of Mr. Fiske, led to the grand jury's indictment of June 7, 1995. All three petitioners were charged with one count of conspiring to defraud the United States by impeding the collection of revenue by the Internal Revenue Service. Petitioners Tucker and Marks each were charged with one count of making a false statement to a small business investment company (Capital Management Services) to obtain a $300,000 loan, and one count of conspiring to do so. (Tucker Pet. App. 13).

The case was assigned to United States District Judge Henry Woods.[4] Petitioners moved to dismiss the indictment on the ground that the OIC did not have jurisdiction to prosecute the offenses charged. Briefs were filed in July 1995, and Judge Woods scheduled a hearing for September 5, 1995. In the meantime, on August 17, 1995, the same grand jury returned a second indictment, which charged petitioner Tucker, James McDougal, and Susan McDougal with various offenses relating to Madison Guaranty and Capital Management Services. *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Aug. 17, 1995).[5]

On September 5, 1995, the district court held a hearing on the motions to dismiss the June 7 indictment. On the same day, the court ordered the indictment dismissed.

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[4] The case was assigned to Judge Woods after Judge Elsijane Roy recused herself. We note that other judges, in both the Eastern District of Arkansas and the Eighth Circuit, have seen fit to recuse themselves from all matters pertaining to the ongoing OIC investigation.

[5] A trial of these charges began in March 1996, and ended on May 28, 1996, with convictions of all three defendants.

The district court rejected the contention, pressed by both the OIC and the Attorney General as *amicus curiae*, that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review. (Tucker Pet. App. 56). The district court then reasoned that the matters charged in the June 7 indictment were "not related at all" to the OIC's jurisdictional mandate. (*Id.* at 57). Accordingly, the district court concluded that the Attorney General could not refer those matters to the OIC, and that the decision whether to prosecute the offenses alleged was vested only in the Attorney General or the United States Attorney for the Eastern District of Arkansas. (*Id.* at 67).

4. The court of appeals reversed. The court held that the Attorney General's decision to refer related matters to an independent counsel is not subject to judicial review. The court noted that prosecutorial decisions of the Attorney General long have been committed to the prosecutor's discretion. (Tucker Pet. App. 6-7). In addition, the court concluded that the definitive answer to the question of reviewability is found in the legislative history of the Ethics in Government Act. (*Id.* at 7). The report of a Conference Committee in 1987, the court explained, reflects explicitly the Committee's intent that "an Attorney General's determinations under the independent counsel law are not subject to judicial review." (Tucker Pet. App. 9).

Alternatively, the court of appeals held that even if the Attorney General's referral decision were subject to judicial review, the offenses charged in the June 7 indictment are related to the OIC's jurisdiction. The court reiterated that, as the statute is writ-

ten, "relatedness" is "an essentially standardless concept," because the term "related" is "undefined and without parameters." (*Id.* at 14). The court rejected as unduly narrow petitioners' argument that a "related matter" referred by the Attorney General to the OIC must be related to James McDougal's or President Clinton's or Mrs. Clinton's relationship to Capital Management Services or Madison Guaranty or the Whitewater Development Corporation. (*Id.* at 17). Instead, the court concluded that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (*Id.* at 18).

The court of appeals had "no difficulty" concluding that the June 7 indictment was sufficiently related to the OIC's mandate. (*Id.*). The court noted that there was an overlap in witnesses and defendants between the June 7 indictment of petitioners and the August 17 indictment of petitioner Tucker and the McDougals, which was at the heart of the OIC's original jurisdiction. The court further explained that there was a clearly defined relationship between Tucker and McDougal, Capital Management Services, and Madison Guaranty—all three of which were specifically named in the order defining the OIC's jurisdiction. Finally, the court observed that Capital Management Services was an entity named in the original jurisdictional order, and that material false statements to Capital Management Services by petitioners Tucker and Marks were alleged in the June 7 indictment. (*Id.*)

Having concluded that the case should be remanded for trial, the court of appeals turned to the government's request that the case be reassigned to a different judge on remand. The court held that the OIC

properly made the request to the court of appeals in the first instance, because the appellate court's authority to assign a case to a different judge on remand is premised on 28 U.S.C. § 2106, not on the recusal statutes alone. (Tucker Pet. App. 24-25). The court concluded that reassignment on remand was necessary to ensure the appearance of impartiality. (*Id.* at 29).

The court explained that information in the public domain, of which it could properly take judicial notice, demonstrated a close personal relationship between Judge Woods and President and Mrs. Clinton. (*Id.* at 21-22). The court also observed that petitioner Tucker had portrayed his prosecution as an attempt to embarrass President Clinton politically, and that President Clinton made a public speech solidifying his connection with Tucker at a lunch the day after Tucker's arraignment. (*Id.* at 22). In sum, the court concluded that given the high profile of the OIC's work and the reported connections among Judge Woods, the Clintons, and petitioner Tucker, reassignment was the proper course. (*Id.* at 26).

The full court of appeals denied petitioners' suggestions for rehearing en banc. (*Id.* at 29). Two judges voted to grant the suggestions and published a dissenting opinion. (*Id.* at 30-46). A third judge voted to rehear only the issue whether the case should be reassigned, but did not join the dissenting opinion.

## ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, this litigation is at an interlocutory stage, and judicial efficiency would be better

served by deferring any review until rendition of final judgment. Further review is therefore not warranted.

1. a. The Ethics in Government Act requires the Special Division to define an independent counsel's jurisdiction adequately to investigate the "subject matter" of the Attorney General's application and "all matters related to that subject matter." 28 U.S.C. § 593(b)(3). The Act also provides a procedure for an independent counsel to confirm whether his jurisdiction, as conferred by the Special Division, extends to a particular matter. That procedure is set forth in Section 594(e) of the Act. If an independent counsel believes that a matter is *related to* (and therefore encompassed within) the jurisdiction defined by the Special Division, he may request the Attorney General or the Special Division to refer that matter to the independent counsel. Upon determining that the matter is related, the Attorney General or the Special Division, as the case may be, may thereupon refer the matter. 28 U.S.C. § 594(e). The OIC scrupulously followed that statutorily-ordained procedure in this case. (Tucker Pet. App. 74-75).

Petitioners continue to assert that the court of appeals' principal holding—that the Attorney General's decision to refer a related matter to an independent counsel is not subject to judicial review—conflicts with this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988). They are wrong. *Morrison* did not address—directly or otherwise—the issue presented in this case.

At bottom, petitioners profoundly misunderstand *Morrison*. The principal questions presented there were whether the delegation of Executive and ap-

pointment powers *to a court* (the Special Division) contravened the Appointments Clause, Article III, or the principle of separation of powers. In upholding the statute, this Court took pains to emphasize the limited role of the Judiciary (through the Special Division) and the centrality of the Attorney General's role under the Ethics in Government Act. *Morrison*, 487 U.S. at 696.

In urging a conflict between the court of appeals' decision and *Morrison*, petitioners invoke *Morrison*'s holding that an independent counsel's jurisdiction as initially defined by the Special Division must be "demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of an independent counsel . . . ." 487 U.S. at 679. (Tucker Pet. 10-11; Marks Pet. 21; Haley Pet. 11). This badly misses the mark. The "demonstrable relationship" requirement is a limitation on the authority of the Special Division to define an independent counsel's original jurisdiction. That requirement stems from constitutional problems spawned by vesting additional Executive power in an Article III court. Nothing in *Morrison* even remotely suggests that judicial review of the Attorney General's actions under the Act is necessary to ensure the constitutionality of the statute. To so transmogrify *Morrison*'s concern as to judicial intrusion (at Congress' instance) into the province of the Executive bespeaks a wildly ill-conceived theory of separation of powers. Indeed, the Special Division itself explained recently that its own authority under Section 594(e), which was discussed in *Morrison*, 487 U.S. at 680 n.18, "contrasts with the Attorney General's broader referral power, *which is*

*not constrained by separation-of-powers concerns.*" *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. Sp. Div. 1996) (emphasis added).

Petitioners' repeated invocation of the Constitution and *Morrison* cannot mask this decisive point: Executive power in this case (the assignment of jurisdiction to a federal prosecutor) was exercised by a principal officer of the Executive Branch (the Attorney General of the United States), not by a court. That pivotal fact ends any separation-of-powers concern and defeats any contention that the decision below conflicts with *Morrison*.

b. Petitioners also err in invoking *Heckler v. Chaney*, 470 U.S. 821 (1985). (Marks Pet. 12; Haley Pet. 8). Petitioners argue that the decision is inconsistent with discussion in *Chaney* concerning the presumption of judicial review of enforcement action by an agency.

The presumption of judicial review is inverted here, where the administrative action involved is the Attorney General's exercise of prosecutorial discretion. To return to first principles: there is a long tradition of deference to prosecutorial judgments of the Executive Branch, and the presumption in that context is against judicial review. This Court and the courts of appeals have held time and again that —unlike typical review of administrative agency actions—fundamental prosecutorial decisions are subject to limited or no judicial review. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (absent evidence of unconstitutional motive, decisions whether or not to prosecute, and what charges to bring before a grand jury, are within realm of prosecutorial discretion); *Ullman v. United States*,

350 U.S. 422, 431-34 (1956) (determination by United States Attorney that public interest requires immunity is not reviewable).[6]

c. In any event, the court of appeals indulgently allowed for the presumption of reviewability urged by petitioners. In response to petitioners' argument, the court recognized this Court's statement that "judicial review of executive action 'will not be cut off *unless there is persuasive reason to believe that such was the purpose of Congress.*'" (Tucker Pet. App. 12 (quoting *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231 (1995) (emphasis in court of appeals' opinion) (internal citations omitted)). After carefully examining the text, structure, and history of the Ethics in Government Act, however, the court expressly found that the evidence of congressional

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[6] *See also United States v. Gonzalez*, 58 F.3d 459, 462 (9th Cir. 1995) ("Separation-of-powers concerns generally require a district court to defer to the government's decision to seek a dismissal of a criminal charge because a denial of the motion would represent an intrusion upon prosecutorial prerogative"); *United States v. Robertson*, 45 F.3d 1423, 1438 (10th Cir.) ("while district courts may reject charge bargains in the sound exercise of judicial discretion, concerns relating to the doctrine of separation of powers counsel hesitancy before second-guessing prosecutorial choices"), *cert. denied*, 115 S. Ct. 2258, 2259 *and* 116 S. Ct. 133 (1995); *United States v. Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) (where prosecutor declines to immunize defense witness, defendant must "make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process before we will depart from the strong tradition of deference to prosecutorial discretion"); *United States v. Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973) (courts are presumed to follow United States Attorney's determination to accept plea agreement because "[h]e alone is in a position to evaluate the government's prosecution resources").

purpose to preclude judicial review of the Attorney General's determination is "more than just persuasive, it is beyond reasonable dispute." (Tucker Pet. App. 12) (internal quotations omitted).

d. As if more were needed, the holding below concerning reviewability does not merit further review for another reason: the court held alternatively that even if the Attorney General's referral were subject to judicial review, then the Landowners Management Systems bankruptcy matter was "related" to the OIC's jurisdiction. Thus, even were petitioners to prevail on their reviewability claim, they would gain no relief, unless the Court were to revisit the fact-bound holding of the court of appeals concerning relatedness and reverse on that score as well.

2. Petitioners argue that the court of appeals also erred by holding, under the facts and circumstances of the independent counsel's investigation, that the Landowners Management Systems bankruptcy matter was related to the subject matter of the OIC's jurisdiction. That alternative holding is quintessentially factbound. The court of appeals' decision pursuasively explains the relationship between the OIC's original jurisdiction, as represented by the August 17 Tucker-McDougal indictment, and the June 7 indictment of petitioners. (Tucker Pet. App. 18). Moreover, the court had before it the fact that petitioner Tucker's ability to borrow $300,000 from Capital Management Services, as charged in the June 7 indictment, was a direct consequence of the fraudulent scheme involving McDougal, Madison Guaranty, and Capital Management Services that was charged in the August 17 indictment. The court's factually-laden conclusion concerning "relatedness" is correct and does not warrant further review.

a. Contrary to petitioner Marks' contention, the decision does not adopt a standard of "administrative convenience" to determine "relatedness" for purposes of 28 U.S.C. § 594(e). The phrase "administrative convenience"—repeated throughout Marks' petition in quotation marks as though it were actually part of the decision—appears nowhere in the opinion of the court of appeals. Rather, the court held that "relatedness for purposes of referral under § 594(e) depends upon the procedural and factual link between the OIC's original prosecutorial jurisdiction and the matter sought to be referred." (Tucker Pet. App. 18). That interpretation of "relatedness" has been endorsed subsequently by the Special Division, *In re Espy*, 80 F.3d at 507-08, and there is no decision to the contrary.

b. The court of appeals' interpretation of the statutory term "related" affords due deference to the Attorney General's construction of a statute that she is charged with administering. The Justice Department, as *amicus curiae* in the courts below, enumerated the factors that may inform an Attorney General's referral decision under Section 594(e):

- whether the same subject or target of an investigation is involved;
- whether there has been similar conduct by some of the parties already being investigated;
- whether there is a significant overlap in potential witnesses, and a resulting potential for interference with an independent counsel's investigation;
- whether the additional matters arise out of the same underlying facts as the original jurisdiction;

- whether the same legal issues are likely to be involved;
- the nature of the new allegations against a person who may be a key witness in an independent counsel's investigation; and
- which prosecutorial body can most efficiently investigate and prosecute the matter.

Brief *Amicus Curiae* of the Department of Justice, filed in No. 95-3268EALR, at 14.

These factors are important to the effective conduct of complex white collar criminal investigations. Petitioners' vision of Section 594(e)—a simple comparison between the face of an indictment and an independent counsel's jurisdictional mandate—conveniently ignores the reality of complex financial-crimes investigations. As the Justice Department explained as *amicus* below, an independent counsel's investigation may uncover evidence of criminal activity committed by a potential witness in a matter at the center of the independent counsel's jurisdiction. Under those circumstances, the Attorney General should enjoy discretion to refer that witness's prosecution to the independent counsel so that, for example, the independent counsel can seek the witness's cooperation in the balance of his investigation.

Or, as here, an independent counsel conducting a detailed review of activities of financial institutions may uncover criminal offenses that do not involve Executive Branch officials covered by the provisions of the Ethics in Government Act. The Justice Department urged, rightly, that "it is contrary to every consideration of judicial and prosecutorial efficiency to deprive the Attorney General of discretion to refer that criminal activity to the independent counsel."

Brief of the Department of Justice at 17. There is no evidence that Congress intended to reject the Justice Department's sensible construction of "related." Further review of the Attorney General's factbound relatedness determination is not warranted.

c. Finally, the interlocutory stage of this litigation counsels against review of the court of appeals' holding that the OIC enjoys jurisdiction to prosecute this case. Even if this Court were to conclude that the decision presents any substantial constitutional or statutory issue, the better course is to wait for this litigation to proceed to final disposition below. If petitioners are convicted, then the Court will be in a position efficiently to consider all claims in a single petition and determine whether review is warranted.

3. Petitioners Tucker and Marks also urge this Court to consider whether the court of appeals correctly determined, on the facts and circumstances of this litigation, that the case should be remanded to a different district judge for trial. The decision below correctly applied settled legal principles to the circumstances of this case. Further review is not warranted.

Petitioners urge that the decision conflicts with the conclusion of other courts of appeals that there is a timeliness requirement for recusal motions filed under 28 U.S.C. § 455(a). Petitioners contend that because the OIC did not move in the district court to recuse Judge Woods, the court of appeals should not have been free to reassign the case on remand.

The authorities cited by petitioners, however, are inapposite to the relief sought by the OIC and granted by the court of appeals. Petitioners cite several cases in which courts of appeals have implied

a timeliness requirement for recusal motions pursuant to 28 U.S.C. § 455(a).[7] The decisions cited by petitioners involve attempts by a party to obtain reversal of a district court's judgment based on the failure of the district judge to recuse. These courts have concluded that a party appealing an adverse ruling should not be able to obtain relief from a judgment based on a disqualification claim that was known, but not raised, in the district court.

In this case, by contrast, the court of appeals did not act pursuant to the recusal statute, 28 U.S.C. § 455(a). The OIC did not urge that the district court's order dismissing the indictment should be reversed because Judge Woods should have recused. The court of appeals reversed solely on the ground that the judgment was wrong as a matter of law. The court addressed the government's request for reassignment only after concluding that the indictment should be reinstated. (Tucker Pet. App. 21, 24-25).

The reassignment of this case to a different judge was based on the court of appeals' statutory authority—independent of the recusal statutes—to require

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[7] *United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994); *The El Fenix v. M/Y Johanny*, 36 F.3d 136, 141 (1st Cir. 1994); *In re Anwiler*, 958 F.2d 925 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992); *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1420-21 (Fed. Cir.), *cert. denied*, 490 U.S. 1947 (1989); *Parker v. Conners Steel Co.*, 855 F.2d 1510, 1526 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989); *Willner v. University of Kansas*, 848 F.2d 1023, 1028 (10th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989); *Phillips v. Amoco Oil*, 799 F.2d 1464, 1472 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

"such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. (Tucker Pet. App. 23). The decision is consistent with this Court's explanation of the reassignment power, *see Liteky v. United States*, 114 S. Ct. 1147, 1156-57 (1994), and the decisions of several courts of appeals that recognize an appellate court's independent authority to reassign a case on remand. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam); *United States v. Bertoli*, 40 F.3d 1384, 1411 (3d Cir. 1994), *cert. denied*, 116 S. Ct. 1425 (1996); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir.), *cert. denied*, 493 U.S. 918 (1989); *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam); *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir.), *cert. denied*, 479 U.S. 988 (1986); *Dyas v. Lockhart*, 705 F.2d 993, 997-98 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983); *United States v. Garcia*, 694 F.2d 294, 296 (1st Cir. 1982) (per curiam); *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam).

The Ninth Circuit, in the course of reassigning a case to a different district judge, explained the flaw in petitioners' timeliness argument:

> We are not acting under the disqualification statutes, which a party must first invoke before the district court. Instead, this court is being asked in the first instance to exercise its inherent power to administer the system of appeals and remands by ordering a case reassigned on remand. The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by

> such reassignment. We do not believe that the statutory provisions concerning disqualification are either exhaustive or the exclusive method whereby a judge may be removed from hearing a case. . . . [T]he appellate court's authority to reassign exists apart from the judicial disqualification statutes. There is simply nothing in the disqualification statutes to prohibit this court from taking appropriate action in the first instance.

*United States v. Sears, Roebuck & Co.*, 785 F.2d at 780-81. Since the decision in this case, the Eighth Circuit itself has distinguished between an appellate court's reassignment power pursuant to 28 U.S.C. § 2106, which does not require a prior recusal motion in the district court, and the recusal statute, 28 U.S.C. § 455(a), which has an implied timeliness requirement. *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996).

Petitioners also complain that the court of appeals should not have taken judicial notice of news reports and other information in the public domain that demonstrated an appearance of judicial bias or partiality. (Marks Pet. 27). The courts of appeals, however, have considered news articles that shed light on the appearance of bias by a trial judge, including articles that recount interviews with the judge himself. *In re IBM Corp.*, 45 F.3d 641, 642-43 (2d Cir. 1995); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1261 & n.1, 1263 n.3 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992). Petitioners cite no case that conflicts with the proposition that a

court of appeals has discretion to take judicial notice of reliable information in the public domain.[8]

Moreover, this case is a poor vehicle for the Court to consider the nuances of the doctrine of judicial notice. Petitioners have not disputed any of the facts relied upon by the court of appeals in its reassignment order. They thus present only an abstract theoretical challenge to a procedural decision of the court of appeals. The court of appeals correctly concluded that the circumstances of this case warranted reassignment. (Tucker Pet. App. 23).

This case has been delayed over one year by the erroneous dismissal of the indictment. Further review of petitioners' factbound claims for the sole purpose of determining which judge will preside at trial is not warranted.

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[8] The cases cited by the two judges dissenting from the denial of rehearing are not to the contrary. (Tucker Pet. App. 39). In three of those cases, the court found that information reported in newspaper articles was demonstrably inaccurate or explained by other information. *United States v. Darden*, 70 F.3d 1507, 1536 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1449 *and* 64 U.S.L.W. 3855 (1996); *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143, 147 (8th Cir. 1991); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1356 n.4 (6th Cir. 1988). In contrast, the court of appeals in this case noted that "[n]owhere do the appellees give us reasons for concluding that the matters the Independent Counsel has brought to our attention do not create an appearance of bias." (Tucker Pet. App. 23). In the fourth case cited by the dissent from denial of rehearing, the Tenth Circuit found that a television interview granted by the district judge required his removal. *United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993).

## CONCLUSION

The petitions for a writ of certorari should be denied.

Respectfully submitted.

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JULY 1996